Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Rulemaking of Fibertech Networks, LLC	))))))	RM - 11303

<u>REPLY COMMENTS OF FIBERTECH NETWORKS</u>

Charles Stockdale,
General Counsel
Robert T. Witthauer,
Deputy General Counsel
FIBERTECH NETWORKS, LLC
140 Allens Creek Road
Rochester, NY 14618

John T. Nakahata
Brita D. Strandberg
Stephanie S. Weiner
Christopher P. Nierman
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

Counsel for Fibertech Networks, LLC

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Summary

Fibertech has asked the Commission to build on its ten years of experience with pole attachments and conduit access since the enactment of the 1996 Act, and to issue rules that adopt best practices and codify existing Commission case law to ensure that competitors deploying new networks receive nondiscriminatory access to poles and conduit. The current regime, which grants pole and conduit owners substantial case-by-case discretion, too often permits owners to delay or limit competitors' access to these essential facilities. The record before the Commission confirms the need for Fibertech's requested rules, as multiple parties echo Fibertech's concerns and offer additional examples of competitive harm caused by pole and conduit owners. By codifying existing best practices, as Fibertech requests, the Commission can promote the deployment of alternative last-mile facilities by removing unnecessary barriers to timely facility construction and entry. Moreover, by permitting prospective attachers to use pole or conduit-owner approved outside contractors in the case of owner delays of records searches, surveys and make-ready work, Fibertech's proposed rules would create incentives for timely performance and give the prospective attachers a remedy that does not require the additional delays inherent in regulatory intervention.

Numerous commenters from across the country have confirmed that the issues Fibertech spotlighted in its petition are neither "one company" issues nor confined to a single state or region of the country. The sad truth is that both ILECs and electric utilities across the country engage in practices that slow and unnecessarily increase the cost of deploying alternative last-mile telecommunications facilities. These commenters confirm

that the rules proposed by Fibertech would help to ameliorate significant sources of unnecessary cost and delay.

Contrary to the suggestions of pole and conduit owners, the FCC's complaint process does not offer a meaningful and timely remedy for the harms documented by Fibertech and others – by its nature, the complaint process occurs at a time after substantial delays have already occurred, takes several months even at its fastest pace, and is too costly to enable timely service to new customers on a routine basis. Fibertech's proposals, furthermore, would remove the need for much regulatory intervention by granting competitors limited rights to act (by hiring utility-approved contractors, for example) when pole and conduit owners fail to comply with Commission rules. Finally, the requested rules, which are necessary to give effect to the statutory guarantee of nondiscriminatory pole and conduit access, are well within the Commission's regulatory authority.

Furthermore, commenters' specific objections to Fibertech's proposals are without merit, and cannot withstand scrutiny. In the first instance, contrary to the depiction by ILECs and electric utilities, pole attachment agreements are not negotiated, but rather are offered as dictated, in take it or leave it terms from the utility. As if seeking to punctuate the extent of its ability to throttle competitors, in the wake of and because of Fibertech's filing its petition, Verizon actually told Fibertech that it would purposefully delay the licensing of conduit to the full extent of the regulatorily-permissible time lines, rather than handling requests in a more expeditious fashion. With respect to use of boxing and extension arms, Verizon's contentions that use of boxing and extension arms are appropriate only in extremely limited circumstance, such as to avoid trees or adjust for deviations in pole alignment, are belied by the extent and nature of Verizon's own reliance on these techniques. The truth is that Verizon uses these cost- and time-saving techniques much more frequently than it has led the Commission to believe , undermining Verizon's claims that competitors' use of these techniques must be restricted.

Even many of the opposing comments confirm that Fibertech has not asked the Commission to break new ground. Many opponents respond to one or more of Fibertech's proposed rules by arguing that they are unnecessary because that particular entity already permits such practices, such as use of outside contractors or installation of drop lines without prior approval (but subject to post-installation notification and inspection). These opposing comments demonstrate that Fibertech's proposals are consistent with existing state and federal precedents, codify best practices in the industry, and ensure safety and reliability. The Commission should reject pole and conduit owners' self-serving arguments and instead move quickly to adopt Fibertech's proposed rules.

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Introduction

Fibertech Networks, LLC hereby submits these Reply Comments in support of its Petition for Rulemaking filed on December 7, 2005.[1] Even at this preliminary stage, the record before the Commission establishes that Fibertech's proposed rules are necessary to ensure that new entrants have a fair opportunity to deploy their networks. The current regime, which allows pole and conduit owners substantial case-by-case discretion, inevitably creates opportunities for owners to delay or limit competitors' access. The record demonstrates that pole and conduit owners have capitalized on these opportunities to impair competition. Indeed, Verizon has already illustrated its anticompetitive aims by promising to delay licensing of or make-ready work on conduit in Albany simply because Fibertech had the temerity to file its rulemaking request.[2]

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[1] Petition for Rulemaking of Fibertech Networks, LLC, RM-11303, filed December 7, 2005 ("Petition"). Unless otherwise specified, all comments refer to January 30, 2006 submissions in RM-11303.

[2] *See* E-mail from Trixie Voellinger to James Baase, Kim Lonobile, and Charles Stockdale (Jan. 30, 2006) (attached hereto as Exhibit 1).

Fibertech's proposals would reduce owners' ability to use the pole and conduit access process against competitors by codifying existing best practices. Further, Fibertech's proposed rules incorporate limited self-enforcing remedies that will reduce the need for burdensome and time-consuming complaint proceedings. By enabling competitors to act (by using utility-approved contractors to perform make-ready work, for example) when owners fail to comply with Commission rules, the Commission will simultaneously reduce the need for regulatory intervention and facilitate the timely deployment of new networks.

These reply comments proceed in two parts. First, Fibertech responds to the general arguments raised by the ILECs and electric utilities and demonstrates that a rulemaking is badly needed to ensure the non-discriminatory pole and conduit access required for facilities-based competition. The evidence in the record confirms that Fibertech is not alone; CLECs nationwide have had similar experiences with pole and conduit owners imposing unnecessary delays and unwarranted expenses on CLECs seeking to deploy competitive facilities. This industry-wide problem plainly calls for an industry-wide solution in the form of Fibertech's requested rules. The record also makes clear that the Commission's existing rules and complaint procedures are insufficient to ensure timely and non-discriminatory access to poles and conduit. Finally, Fibertech explains that its proposed rules are well within the Commission's statutory authority under section 224.

Second, Fibertech reviews the specific objections to its proposed rules, revealing that they are unfounded, incorrect, or unpersuasive. Contrary to pole and conduit owners' contentions, Fibertech's proposed rules are in accord with existing state and federal precedents, codify the best practices in the industry, and do not impair safety and reliability. Based on the experiences of Fibertech and other CLECs, the proposed rules constrain pole and conduit owners' discretion as needed to prevent discriminatory and anti-competitive conduct, without interfering with owners' real concerns for safety and reliability. Moreover, wherever possible Fibertech's proposals minimize the need for regulatory oversight by providing competitors with limited rights to take corrective action when pole and conduit owners are unable or unwilling to comply with Commission rules.

The need for Fibertech's proposed rules cannot be overstated. Under the current system, pole and conduit owners have exploited the discretion afforded them and engaged in discriminatory practices that have come to pervade the industry and hinder competition. The Commission cannot allow access to poles and conduit – the essential building blocks of facilities-based competition – to remain vulnerable to pole and conduit owners' anti-competitive manipulation.

I. A RULEMAKING IS BOTH NECESSARY AND THE CORRECT APPROACH FOR ENSURING NON-DISCRIMINATORY ACCESS TO POLES AND CONDUIT IN ORDER TO SUPPORT FACILITIES-BASED COMPETITION.

Opposing commenters seek to minimize the import of Fibertech's Petition, claiming that it merely addresses the unsupported allegations of a single CLEC against a few ILECs and that the forces of competition along with the Commission's existing rules and complaint process are adequate to address Fibertech's grievances. The record in this proceeding, however, demonstrates the opposite – the proposed rulemaking is desperately needed to resolve well-documented industry-wide problems in obtaining the non-discriminatory access to poles and conduit essential to the development of facilities-based competition. Fibertech and other CLECs are not seeking *free* access to poles, just fair and timely access to poles and conduits that will allow them to fulfill the Commission's and the Communications Act's goal of *facilities-based* last-mile, advanced telecommunications competition.

A. The Record Is Replete With Evidence That The FCC's Current Regime Fails To Ensure Non-Discriminatory Access To Poles And Conduit.

Opponents of the Petition assert that Fibertech's "isolated and anecdotal" allegations do not show that "that a widespread problem exists,"[3] that the Petition "has not presented evidence to warrant altering the current rules,"[4] and that any problems have "not [been] demonstrated with substantive evidence."[5] The submissions by supporting commenters, however, corroborate Fibertech's allegations and demonstrate the existence of a widespread problem. In short, the record makes clear that flaws in the current regulatory regime continue to allow pole owners to wield their greater bargaining power and strategically manipulate the process by which their rivals must gain access to poles and conduit.

Briefly reviewing the submissions by competitive providers of telecommunications services calling on the Commission to initiate a proceeding to adopt Fibertech's proposed rules confirms that the current pole attachment system is broken, and is an obstacle to the development of facilities-based last-mile competition. As Sigecom, LLC, a CLEC offering facilities-based services around Evansville, Indiana,

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[3] United Telecom Council Comments at 1, 15 ("UTC Comments").

[4] Joint Opposition of American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric Power Company, WPS Resources Corporation and Xcel Energy Inc. at 3 ("AEPSC et. al. Comments").

[5] Opposition of the United States Telecom Association at 2 ("USTA Comments")

explains, the "similarity" of CLEC "experience[s] to that described by Fibertech is an indication that these are not isolated incidents, but rather pervasive obstacles to competition."[6]

segTEL, Inc., for example, confirms that "[m]any of segTEL's experiences correspond closely with the experiences described by Fibertech,"[7] while McLeodUSA Telecommunications Services, Inc. was "struck by the similarity of its own experience[s] to those described by Fibertech."[8] In particular, segTEL cites experiences with pole owners that took over *500 days* to complete surveys and make-ready work, one utility that had *never* provided access within 45 days, utilities that inflated record review and field survey charges by 70 percent over what similar utilities charge, and a conduit owner whose excessive pre-payment charges for manhole surveys inhibited market entry.[9] And McLeodUSA, whose fiber network is principally located in upper Midwestern States, reports that "pole boxing and extension arms have been widely used by telephone utilities throughout its service area, even on some of the utilities' poles where such practices are supposedly prohibited."[10]

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[6] Comments of Sigecom, LLC at 1 ("Sigecom Comments"). In particular, Sigecom confirmed that pole owners routinely exceed the 45 day timeframe for granting access and that the related "fees charged . . . exceed reasonable amounts." *Id.* at 4, 7.

[7] Comments of segTEL at ii ("segTEL Comments"). segTEL also proposes an additional rule regarding pole owners responsibility for correcting past practices that have caused wasted space on poles. Fibertech does not oppose such a rule so long as it would not delay Commission action on Fibertech's requested relief. *See id.* at 3-5.

[8] Comments of McLeodUSA Telecommunications Services, Inc. at 1 ("McLeodUSA Comments").

[9] segTEL Comments at 5, 6, 9, 10.

[10] McLeodUSA Comments at 2-3.

Operating in Indiana, Illinois, Ohio, and Kentucky, Indiana Fiber Works, LLC ("IFW") has "faced repeated barriers to gaining access to essential pole and conduit resources." IFW reports its own experiences with inconsistent and excessive survey and make-ready time-frames and explains that it has forgone competition where such pole-owner delays in granting access have made IFW's entry into the market financially unviable.[11] Nevada-based CLEC Virtual Hipster also "has encountered unreasonable rates, terms and conditions for access, as well as unjust delays in negotiating terms and conditions of access."[12] And Virtual Hipster cites a number of examples in which "utilities are invoking alleged safety concerns discriminatorily to deny certain attachments when in fact, no safety problems are presented."[13] Likewise, NextG Networks, Inc.,[14] which provides fiber-based facilities and services to wireless providers, "has encountered many of the same problems with obtaining just, reasonable, and timely access to utility poles."[15] For example, NextG recounts one case in which it paid for work on 14 poles that was not completed for six months, and only after contact from a NextG attorney.[16]

[11] Comments of Indiana Fiber Works, LLC at 1, 3.

[12] Comments of Virtual Hipster at 4.

[13] *Id.* at 6.

[14] Virtual Hipster and NextG also put forth proposals pertaining to attachments for wireless carriers. Fibertech does not oppose these proposals so long as they would not delay Commission action on Fibertech's requests.

[15] Comments of NextG Networks, Inc. at 1.

[16] *Id.* at 5.

The comments filed by COMPTEL place all of this evidence of utilities' and ILECs' anticompetitive practices in context.[17] COMPTEL explains that its members who are providers of fiber facilities "frequently encounter" the situation whereby a CLEC competing to provide service to a new customer and dependant upon access to poles and conduit is thwarted by ILEC delays and charges.[18] Thus, far from "isolated" or "anecdotal," the issues raised by Fibertech's petition are well documented nation-wide problems that pervade the industry, hindering the development of facilities-based competition.

B. The Petition Presents Far More Than A Dispute Between Fibertech and Verizon.

Various commenters representing the electric utility industry draw an incorrect inference from Fibertech's petition when they conclude that the problem presented by Fibertech is limited to a particular relationship between two companies and that adjudication of a complaint rather than institution of a rulemaking is warranted. Attempting to distance themselves from the Petition, these commenters also state that Fibertech has "not provided evidence or even alleged wrongdoing by any member of the class of . . . electric utilities."[19] As described above, however, the record clearly reveals an industry-wide problem among CLECs, ILECs, *and* electric utilities.

[17] COMPTEL also argues that in the course of its rulemaking the Commission should address enforcement and remediation, proposing that the Commission presume that a failure to comply with its non-discrimination rules is a violation of section 251(b)(4) and a violation of section 271(d)(6) when committed by an ILEC. Fibertech supports COMPTEL's proposals.

[18] Comments of COMPTEL at 9 ("COMPTEL Comments").

[19] *See* Statement In Opposition of Ameren Corporation, et.al. at 4-6 ("Ameren et. al Comments"); *see also* AEPSC et. al. Comments at 4; UTC Comments at 6.

The comments filed by Sunesys, Inc., in particular, detail anti-competitive conduct by utilities no less egregious than that practiced by the ILECs.[20] As Sunesys reports, utilities' practices frequently "render[] Sunesys unable to economically provide services that its customers want and that it otherwise would provide."[21] For example, Sunesys was forced to abandon efforts to provide service to a Maryland school district because Baltimore Gas and Electric's excessive charges for access rendered the project economically infeasible.[22] In addition, Sunyses has ceased attempts to enter the Delaware market because the make-ready costs and delays by Conectiv in granting pole licenses made it "economically [in]feasible to compete in Delaware."[23] Sunyses also recounts losing a customer to Public Service Electric and Gas Company ("PSE&G") when PSE&G failed to perform, or even schedule, the make-ready work necessary for Sunyses to meet the customer's promised nine month delivery date of service. Only after PSE&G contracted directly with the customer, did the utility perform the work and bill Sunesys.[24] More generally, Sunesys cites the unpredictability of utilities' time frames for make-ready work, reporting that "the delays between the submission of pole attachment applications and the grant of pole attachment permits have exceeded fifteen months, and in a number instances in the case of PSE&G were in excess of four years."[25]

[20] *See* Comments of Sunesys, Inc. at iii.

[21] *Id.* at 7.

[22] *Id.* at 7.

[23] *Id.* at 8.

[24] *Id.* at 10.

[25] *Id.* at 11.

Fibertech's own experiences with electric utilities corroborate such accounts. During its five years of operation, Fibertech has found electric utilities, on the whole, to be no more cooperative in granting access to their right-of-way facilities than are incumbent local telephone companies. Fibertech has resorted to litigation against a total of five different electric utilities to gain reasonable access to their poles. This litigation involved one electric company in New York State, two electric companies in Massachusetts, one electric company in Pennsylvania, and one electric company in Delaware. Fibertech has also sought the assistance of the Ohio Public Utilities Commission, through mediation, to gain reasonable access to electric utility poles in that state. Of these six electric utilities, five were affiliated with companies providing telecommunications services in competition with Fibertech, and one was conducting a broadband-over-power-line pilot project.[26] And while the complaint process was available, with electric companies as well as with telephone companies, relief could hardly be characterized as timely.

Currently, Fibertech is struggling to gain access to poles owned by Narragansett Electric Company in Rhode Island. Fibertech has filed 21 pole license applications with Narragansett Electric Company in Rhode Island during the period of October 21, 2005, through November 23, 2005.[27] Although these applications have been outstanding for periods of between 98 and 131 days, Narragansett has issued make-ready estimates for only three of the 21 applications – notwithstanding the Commission's rule that make-

[26] Fibertech did not support its petition by citing the circumstances leading up to these litigated cases, because the disputes – after long delays – were resolved by settlement agreements including confidentiality provisions or are in the process of being settled.

[27] *See* Supplemental Declaration of Charles Stockdale ¶2("Stockdale Supp. Decl.") (attached hereto as Exhibit 2).

ready estimates be provided within 45 days.[28] As a result, Fibertech's intended customers, including a hospital, a court system, and a competitive telecommunications company seeking to use facilities other than Verizon's, have been forced to wait and, may, possibly, turn to another provider to satisfy their needs.

Although Fibertech has had the option of bringing complaints against Narragansett upon expiration of the 45-day period following submission of each application (as the electric utility commenters apparently would recommend), that is a cumbersome, inefficient and highly burdensome approach. For one thing, Fibertech has been enmeshed in litigation with two other utilities, one electric company and one ILEC, and Fibertech's resources for litigation are limited. Moreover, even if Fibertech were to initiate adjudicatory proceedings against Narragansett, unless Narragansett voluntarily processes Fibertech's applications, Fibertech will remain unable to deploy its facilities for the additional months while those proceedings are pending. As a result Fibertech would either lose its customers or its customers would be forced to wait for the broadband connectivity they desire.

Fibertech's proposed rules provide a far superior result that is less burdensome on the parties and this Commission, and more likely to be effective and efficient. Under Fibertech's proposals, when faced with Narragansett's foot-dragging, Fibertech could have hired a utility-approved contractor to survey the poles and recommend make-ready work, which would have permitted it to deploy its intended facilities in a timely manner and eliminated the need for complaint litigation.

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[28] *See id.*

C. The Record Demonstrates That A Rulemaking Is Required.

A number of commenters contend that Commission action is not needed here, claiming that the existing rules, which emphasize private negotiations and case-by-case adjudication, are adequate.[29] As punctuated by the previous example of Narragansett Electric, Fibertech and supporting commenters have shown that despite the FCC's existing regulatory framework, pole owners – particularly those in competition with prospective attachers – can and do act strategically to raise rivals' costs and increase delays thereby hindering competitive access. The existing rules and complaint process have proven inadequate to address such anti-competitive conduct.

1. The existing rules insufficiently protect timely competitive access to poles and conduit.

As Fibertech noted in its Petition, the Commission's *Local Competition Order* adopted general rules, informed by guidelines and presumptions, to allow for flexibility in pole attachment and conduit arrangements.[30] But the Commission also made clear that it would "monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services."[31] The anti-competitive practices described throughout the record, along with the emergence of the best practices described in the

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[29] *See e.g.* Comments of Qwest Communications at 2-3 ("Qwest Comments") ("The Commission's current process for addressing these issues is sufficient.")

[30] *See* Petition at 3 n.3, *citing*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16067-68 (¶ 1143) (1996) ("*Local Competition Order*").

[31] Local Competition Order. at 16068 (¶ 1143).

Petition, demonstrate that the time has come for the Commission to revisit, clarify, and build upon its existing rules and guidelines.

Arguing that such Commission action is unnecessary, United Telecom Council ("UTC") claims that competition is already flourishing and that there is "no indication that pole attachments are impeding competition or access."[32] But the record evidence discussed above belies this rosy scenario. Indeed, it is now more important than ever for the Commission to take the necessary steps to protect and facilitate competition. As segTEL puts it: "the ability of telecommunications providers to efficiently utilize existing poles and conduit is an essential factor in the successful development of tomorrow's communication networks."[33]

The Commission has long recognized that ensuring "fair and nondiscriminatory access to poles and other facilities" is essential to the competitive deployment of communications networks.[34] And the Commission's 2005 unbundled network element decision was predicated on the assumption that existing conduit would be available to competitive carriers seeking to deploy their own facilities.[35] COMPTEL, moreover, correctly points out that the "supply-side" obstacles to competition identified by Fibertech are among those that the Commission can and should step in to resolve.[36] As

[32] UTC Comments at 6.

[33] segTEL Comments at 2.

[34] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6780 (¶ 2) (1998) ("*Pole Attachment Order*").

[35] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2581 (¶ 77) (2005).

[36] COMPTEL Comments at 3-4.

COMPTEL concludes, the "importance of Fibertech's Petition to the Commission's vision for the development of competition based on different technologies and diverse facilities cannot be overstated."[37] We could not agree more.

Indeed, competition depends on making access to poles and conduit as equal as possible among all telecom providers. In its petition, the United States Telecom Association ("USTA") requests that its members be covered by the rate provisions of Section 224.[38] While Fibertech does not oppose USTA's request, it firmly believes that the Commission should not address these issues in a piecemeal fashion. It would further skew the competitive landscape if ILECs are granted relief while competitors' concerns are not addressed. Because ILECs do not need to apply for attachment licenses, even on jointly owned poles, they do not need to wait for surveys or for permission to attach. Thus, any delays and burdens in the licensing process that are not absolutely necessary to safe construction (e.g., waiting for pole owners to do surveys or to complete make-ready work when the applicant could do the work sooner or charging unnecessary or excessive fees) unavoidably impose a competitive handicap on non-ILEC licensees. The Commission's ultimate purpose should be to eliminate *all* such unnecessary delays and burdens.

The Commission should also be wary of the emphasis that AT&T and Qwest place on the ability of negotiated agreements to resolve these issues. Many so-called "agreements" are, in reality, unilaterally imposed on attachers who have no choice but to

[37] *Id.* at 1-2.

[38] *See* Petition of The United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293 (filed October 11, 2005).

"agree" if they want access to existing poles and conduit. Indeed, the Commission has recognized that parties do not have equal bargaining positions in the circumstances presented by Fibertech. Like ILECs negotiating interconnection agreements with prospective competitors, pole owners are "likely to have scant, if any, economic incentive to reach agreement" with "new competitors [that] seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market."[39] Indeed, the very purpose of section 224 is to remedy this inequity.[40] The record in this proceeding confirms that pole and conduit owners continue to wield "unequal bargaining power."[41] As McLeodUSA explains, the majority of "agreements are heavily weighted toward transferring risks to the attaching party and limiting the obligations of the pole owner."[42]

We are compelled to note that ILECs' ability to manipulate the existing rules and guidelines for their own purposes has been illustrated most recently by Verizon's response to Fibertech's filing of the instant Petition. According to an email from Verizon (attached as Exhibit 1), Verizon has altered its practice in Albany with regard to manhole surveys at least in part "due to the fact that Fibertech has complained to the FCC about Verizon 'delays' with regard to Pole and Conduit applications."[43] In apparent retaliation for Fibertech's request for regulatory relief, Verizon delayed a manhole survey requested for February 2, 2006 until March 15, 2006, and – as discussed further below – appears to

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[39] *Pole Attachments Order*, 13 FCC Rcd. at 6789 (¶ 23).

[40] *See id.* at 6794 (¶ 31).

[41] segTEL Comments at 15.

[42] McLeodUSA Comments at 3.

[43] *See* Exhibit 1.

have changed its policy in Albany to prevent Fibertech from observing the survey to confirm its accuracy. This just goes to show the need for the Commission to initiate a rulemaking to adopt Fibertech's proposals. Access to poles and conduit should be governed by issues of safety, reliability and engineering, not retaliation against rivals for seeking an even playing field – or for having the audacity to compete.

2. The Commission's complaint process is not an adequate or effective solution.

Petition opponents also argue that rules are unnecessary because the current complaint process is sufficient to address any anti-competitive problems.[44] But, as Fibertech's Petition explained and supporting commenters confirm, the Commission's complaint process is unsatisfactory because issue-by-issue litigation is expensive, time-consuming, and not necessarily transparent. We again urge the Commission to adopt rules (allowing exceptions by waivers) – which will be more efficient and effective for both parties and the Commission.

It is correct that certain FCC orders address certain aspects of issues raised by Fibertech.[45] Indeed, as the Petition made clear, Fibertech's proposed rules are not intended to break new ground, but seek to take advantage of the existing experience with safe pole attachment and conduit practices. As segTEL points out, however, the "Commission's decisions are spread throughout hundreds of pages of decisions where they may be difficult to find. . . . While the records of adjudications provide valuable

[44] *See, e.g.,* Qwest Comments at 3 (claiming that there is no reason to deviate from FCC view that access issues are best addressed case-by-case); UTC Comments at 3-6 (arguing that rules are "unnecessary and contrary to existing pole attachment policy" which emphasizes case-by-case adjudication).

[45] *See* Ameren et. al. Comments at 16-18.

'regulatory common law,' they are not as effective as are rules of the Commission in affecting the future conduct of pole and conduit owners."[46] In addition, the problem – raised in the Petition and now documented by the record – is that pole owners either do not follow the Commission's decisions or strategically manipulate the existing rules and guidelines for their own competitive advantage. In this proceeding, Fibertech asks the Commission to use evidence of such experiences to separate pole owner conduct that is grounded in real issues of safety and reliability from conduct that is merely a pretext for anti-competitive behavior.

More generally, the FCC complaint proceeding is cumbersome and expensive. Such proceedings require detailed factual showings akin to those required for summary judgment, yet place strict limits on allowable discovery. As a result, proving discrimination can be extremely difficult. Forcing competitors into these time-consuming and costly proceedings in order to deploy new networks and enforce nondiscrimination rights stymies, rather than advances, competition. Even the FCC's rocket docket takes a minimum of approximately six months to resolve cases (including what is a *de facto* mandatory mediation period), and few potential customers will wait six months for competitive service, no matter how attractive. Rules, on the other hand, which remove uncertainty and ensure consistent treatment, have additional salutary effects. Even codifying existing FCC holdings would increase transparency and facilitate state adoption of these practices in those states that regulate pole attachments.

Even more significantly, however, many of Fibertech's rules are meant to create mechanisms that allow the prospective attacher to take steps to mitigate the competitive

[46] segTEL Comments at 2.

harm caused by delay, separate and apart from filing a complaint, while still protecting the legitimate interests of the utilities. For example, Fibertech's proposal that CLECs be permitted to hire utility-approved contractors to perform field surveys and make-ready work when the pole owner cannot meet the relevant legal deadline allows CLECs faced with lengthy and discriminatory delays to take corrective action, without threatening safety and reliability and without the need for any further regulatory intervention. By providing such self-effectuating remedies, the Commission obviates the need for prospective attachers to file formal complaints that have virtually no prospect of providing timely relief.

D. Adopting Fibertech's Proposed Rules Is Well Within The Commission's Regulatory Authority Under Section 224.

Some Petition opponents contend that the FCC's jurisdiction with respect to electric utilities is limited to regulating attachment rates and argue that the Commission should refrain from interfering with state agency efforts to resolve pole attachment issues.[47] The Commission should reject such a crabbed reading of its regulatory authority. In section 224, Congress charged the Commission with ensuring access to poles and conduit on terms that are just, reasonable, and nondiscriminatory. The Commission has not only the authority, but also the obligation to take action as necessary to fulfill that mandate.

Petition opponents argue that Congress conferred upon the FCC only limited authority over electric utilities and that it is therefore inappropriate for the Commission to mandate electric utility practices affecting safety, reliability, and engineering standards.

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[47] *See* AEPSC et. al. Comments at 4-13.

While, to be sure, the FCC does not have comprehensive authority over electric utilities, they are expressly included within statute.[48] And section 224 gives the Commission clear authority to regulate the rates, terms, and conditions of pole attachments and to ensure that such attachments are just, reasonable, and nondiscriminatory.[49] Contrary to what some utilities seem to imply, Fibertech does not ask the Commission to prioritize non-discrimination over safety, but rather to adopt rules that will ensure now-lacking non-discrimination, without sacrificing safety and reliability. While the utilities articulate generalized fears of impaired safety and reliability, they do not point to any discrepancy between Fibertech's proposed rules and established safety standards such as the NESC. As demonstrated by the fact that state commissions have adopted similar rules and fair-minded utilities already conform to similar practices, Fibertech's proposals do not threaten safety, reliability, or engineering standards.

Relying on *Southern Co. v. FCC*, 293 F.3d 1338, 1346-7 (11th Cir. 2002), several electric utilities also contend that the FCC lacks statutory authority to adopt Fibertech's proposed rule concerning the use of boxing and extension arms because it would constitute an unlawful capacity expansion requirement.[50] In *Southern*, the Eleventh Circuit – the only circuit court to have addressed the issue – found that electric utilities have no obligation to expand capacity under what it read to be the unambiguous language of 47 U.S.C. § 224(f)(2).

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[48] *See* 47 U.S.C. § 224(a)(1), (f).

[49] *Id.* at § 224(b), (f).

[50] *See* Ameren et. al. Comments at 15-16; AEPSC et. al. Comments at 5.

We believe that *Southern* was incorrectly decided. In our view, the Commission's guideline, which "require[d] a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs,"[51] should have been upheld as a straightforward application of the statute's core nondiscrimination principle. While section 224(f)(2) allows a utility to deny access on the basis of "insufficient capacity," the statute does not define the term "insufficient capacity."[52] Moreover, any such denial must still be done on "a non-discriminatory basis."[53] Thus, we submit that the Eleventh Circuit erred in finding that this language unambiguously exempted utilities altogether from any obligation to expand capacity. To the contrary, the Commission's interpretation of section 224(f) – requiring a utility to take reasonable steps to expand capacity for competitors on the same basis that it would do so for its own purposes – was both correct and reasonable, particularly in light of the 1996 Act's emphasis on encouraging competition. The Eleventh Circuit, in essence, permitted discriminatory capacity expansion, in direct contravention of the words of Section 224(f).

Even if *Southern* were correct, however, the utilities' attempt to rely on *Southern* here is misplaced. A licensee's use of boxing or extension arms is an efficient use of existing capacity (i.e. pole height), and does not require any expansion of capacity by the pole owner (i.e, replacement of the pole with a pole of greater height).

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[51] *See Implementation of the Local Competition Provisions in the Telecommuications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers,* Order on Reconsideration, 14 FCC Rcd. 18049, 18067 (¶ 51) (1999); *see also Local Competition Order*, 11 FCC Rcd. at 16075-76 (¶ 1162).

[52] 47 U.S.C. § 224(f)(2).

[53] *Id.*

The utilities' contrary assertion rests on an overbroad reading of what it means to "expand capacity," one that would allow the utility to avoid even basic make-ready work. But electric utilities plainly have an obligation (where safe and reliable) to rearrange facilities on an existing pole to accommodate a new attachment. And no one could argue that this "expands" the utilities' capacity.[54] Similarly, permitting the use of boxing and extension arms does not expand the pole owner's capacity. In fact, the use of such techniques – unlike even the basic rearrangement of existing facilities – does not require the pole owner to move existing facilities or otherwise obligate the pole owner to do anything at all. The necessary work to box the pole or install the extension arm is performed by the attacher and these new facilities remain the property of the attacher. As such, Fibertech's proposed rule for boxing and extension arms does not require a pole owner to expand capacity but rather requires only that an owner allow existing capacity to be used in the most efficient manner. The Commission, therefore, clearly has the authority under section 224 to adopt the proposed rule.

Rather than offering a basis to deny the Petition, *Southern* presents the Commission with a compelling reason to adopt Fibertech's proposal. If, under *Southern*, utilities cannot be required to replace existing poles with larger poles to accommodate license applicants, utilities will have the power to effectively end the aerial deployment of competitive facilities *unless* applicants have the opportunity to box the poles or use extension arms to attach their facilities.

[54] Such an expansive interpretation would allow section 224(f)(2)'s exception to swallow section 224(f)(1)'s rule and strip the statute's non-discrimination mandate of all meaning.

Finally, Fibertech is not asking the Commission to displace state authority.[55] WMECO is correct that Fibertech's proposed rules would not affect pole owners in states that have adopted regulations in "reverse-preemption" of FCC rules pursuant to section 224(c). But Fibertech does call upon the Commission to clarify and establish consistency in pole and conduit attachment standards with respect to other states that have not regulated pole attachments of their own accord. We recognize that the FCC has deferred to state pole attachment regulations where they have been enacted, and believe the Commission should continue to do so. Thus, contrary to some utilities' predictions,[56] Fibertech does not anticipate that the rules will create conflicts between federal and state regulators. Where states have not regulated, however, the Commission must step in, filling the gaps as needed to ensure non-discriminatory access to poles and conduit.

II. FIBERTECH'S PROPOSED RULES ARE IN ACCORD WITH EXISTING POLE ATTACHMENT PRECEDENT AND POLICY, CONSISTENT WITH INDUSTRY BEST PRACTICES, AND WILL NOT IMPAIR SAFETY AND RELIABILITY.

As demonstrated in its Petition, Fibertech's proposed rules are consistent with existing FCC and state precedents, adhere to safety and reliability standards, and mirror existing practices of the more fair-minded pole owners in the industry. Fibertech, joined now by the supporting commenters, calls upon the Commission to codify these practices in order to remove uncertainty in the area of pole and conduit access and to bring non-conforming pole owners into line with the industry best practices essential to ensuring non-discriminatory access.

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[55] *See* Ameren et. al. Comments at 11-13 (arguing that Commission action is unnecessary because state regulation is comprehensive and sufficient); AEPSC et. al. Comments at 6-7.

[56] *See* Ameren et. al. Comments at 13.

Opposing commenters raise a number of objections to Fibertech's proposed rules that are either incorrect or unconvincing. Before turning to the individual proposals, however, we emphasize three general responses to opposing commenters' claims. *First*, Fibertech's proposals are consistent with current engineering standards. By either misconstruing or misunderstanding Fibertech's proposed rules, pole owners contend that the rules pose safety, security, and reliability concerns.[57] As discussed further below, such fears are illusory. None of the proposed rules would impair safety, reliability, or security.

Second, the Petition presents an accurate snapshot of both industry best practices and the prevalence of anti-competitive pole owner conduct. A number of utility and ILEC commenters dispute Fibertech's (and the CLEC commenters') experiences obtaining pole and conduit access. But these denials are belied by the evidence, particularly when it is viewed in light of the competitive incentives in the industry.

Qwest, for example, contends that Fibertech's rules "do not reflect best practices in the industry."[58] Yet its own comments reveal that it adheres to many of the proposed rules already, such as allowing approved contractors to perform work, allowing drop lines, allowing attachers to search conduit records, and generally allowing make-ready work to be performed without supervision.[59] On the other end of the spectrum, Verizon denies that it has engaged in any anti-competitive conduct, claiming that its current practices conform – or even improve upon – Fibertech's proposed rules. As described

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[57] *See, e.g.*, UTC Comments at 6-18 (claiming that various proposals are unnecessary and unsafe and prevent utilities from ensuring security and reliability).

[58] Qwest Comments at 2.

[59] *See id.* at 6-10.

below, however, the evidence shows that Verizon's claims are, at best, misleading and, at worst, simply untrue.

Third, while Fibertech recognizes the need for flexibility in pole and conduit access, the Commission must recognize that unchecked discretion, when wielded by a competitor, is inherently susceptible to anticompetitive manipulation. Petition opponents attempt to seek refuge in arguments that rest on the need to preserve pole owners' case-by-case discretion without any prescriptive regulatory interference.[60] But these arguments must be placed in perspective. The obvious incentive for ILECs and electric companies to hinder access by competitors to poles and conduit provides sufficient justification for the FCC to limit their ability to accomplish that end. Fibertech's proposed rules have been carefully drafted to constrain the unbridled pole owner discretion that enables anticompetitive conduct, while preserving sufficient flexibility to ensure safety and reliability.

A. The Commission Should Require Pole Owners To Permit Use Of Boxing And Extension Arms In Appropriate Circumstances.

Verizon opposes Fibertech's proposal to establish a competitor's right to box a pole or use an extension arm to avoid heavy make-ready work where the pole can be reached by bucket truck or ladder and all NESC requirements will be satisfied. Instead, Verizon argues, "the safety and feasibility of using boxing or extension arms must be evaluated on a case-by-case basis, taking account of numerous factors, such as the

[60] *See, e.g.*, USTA Comments at 4-6 (arguing that the Commission should not establish set rules for all types of pole and conduit access).

location of the pole and the placement of prior attachments."[61] Other utility commenters adopt similar arguments.[62] The essence of this position is that utilities and ILECs should retain the unchecked authority to decide whether a competitor should be allowed to benefit from efficient construction techniques.

These comments fail to note the fact that Fibertech's proposal accounts for the very criteria that Verizon argues must be considered – if (1) the pole is located so as to not be reachable by bucket truck or ladder; or (2) prior attachments have been placed so that attaching a new cable by boxing or use of an extension arm would create a violation of the NESC, the right to box or use the arm will not apply.[63]

Verizon and other pole owners' concerns are overstated. This is made clear by the high frequency with which pole owners historically have boxed poles and by their current use of boxing and extension arms to avoid the delays and costs of make-ready work. For example, in 2003, Fibertech commissioned a survey of approximately 60 route miles of pole plant in and around Springfield, Massachusetts. Fibertech had attached to none of the poles along the route.[64] Of the 2,324 poles examined, 622 (or 26.8%) had been boxed by Verizon, the electric company, the cable television company, or more than

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[61] Verizon's Opposition to Fibertech's Petition for Rulemaking at 2 ("Verizon Comments").

[62] *See* UTC Comments at 10-11; AEPSC et. al. Comments at 15-18.

[63] Petition at 13-16. Fibertech would not object, of course, to adding language to the proposed rules confirming that the rules do not require any violation of the NESC.

[64] *See* Stockdale Supp. Decl. ¶ 3.

one of these entities.[65] Boxed poles are common in all the markets in which Fibertech has deployed facilities.[66]

Similarly, Verizon's statement that "Verizon 'boxes' its own poles … in certain limited circumstances"[67] is, at best, somewhat misleading or uninformed. As revealed in the Declaration of James Baase and attached photographs, for example, along two pole lines to which Fibertech is seeking access in the Buffalo suburb of Amherst, New York, Verizon has used boxing to install new cable on 108 out of 119 poles.[68] Thus, it appears that the "certain limited circumstances" cited by Verizon are broad enough to encompass situations where the speedy and inexpensive deployment of facilities promotes its business interests.[69]

Verizon asserts that it only "permits extension arms or brackets in those limited cases when it is necessary to extend the cable away from the pole in order to obtain sufficient clearance from a building or tree or to improve cable alignment" and notes that a case-by-case determination is required to consider "the location of the pole and other

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[65] *See id.* .

[66] *See id.* . As discussed above, this is equally true of other regions. *See, e.g.,* McLeod Comments at 2-3 (reporting that "pole boxing and extension arms have been widely used by telephone utilities throughout its service area, even on some of the utilities' poles where such practices are supposedly prohibited").

[67] Verizon Comments at 3.

[68] Declaration of James Baase ¶ 3 (attached hereto as Exhibit 3).

[69] According to a recent Washington Post article, for example, Lawrence Babbio Jr., Verizon's Vice Chairman and President, touted Verizon's success in reducing the cost of deploying its FIOS network. Fibertech believes that such cost savings are likely due to Verizon's increasing reliance on boxing and extension arm techniques to reduce make-ready costs. *See* Arshad Mohammed, *Verizon Lays It On The Line*, Washington Post, Feb. 1, 2006 at D1.

nearby structures or objects."[70] Verizon also claims that it "does not permit extension arms to be used merely to increase the capacity on the pole."[71] However, inspection of Verizon's actual facilities in the field shows that Verizon has not followed these supposed rules in its own construction. The attached Declaration of Robert Enright and the accompanying photographs demonstrate that the poles to which Verizon attached its new fiber-optic cable by means of extension arms are simple, straight-line distribution poles presenting no cable alignment issues and located far from buildings or trees.[72] All indications are that Verizon used the arms to maximize pole capacity without incurring the costs and delays inherent in more involved make-ready work.

Verizon's and the electric industry's comments also implicitly suggest that the "case-by-case" approach they recommend for determining when to allow boxing or use of extension arms will consist of fair and competitively neutral evaluations. Based on Fibertech's experience, however, such evaluations are more apt to be strongly influenced by the pole owners' competitive interests. For example, Verizon's comments refer to the fact that Verizon has allowed Fibertech to box 14 poles in Agawam, Massachusetts, and one pole each in Easthampton and Northampton, Massachusetts. Fibertech has attached to 253 poles in Agawam, 184 poles in Easthampton, and 214 poles in Northampton.[73] Thus, it was allowed to box approximately 2.5% of the poles it attached to in Agawam, Easthampton, and Northampton. The 2003 Springfield-area pole survey conducted on

[70] Verizon Comments at 3; *see also id.,* Harrington Declaration ¶ 14.

[71] Verizon Comments at 3.

[72] *See* Declaration of Robert Enright ¶¶ 2-3(attached hereto as Exhibit 4); *see also* Petition Exhibit 4 (showing poles unobstructed by trees or buildings which Verizon has boxed or has employed extension arms).

[73] *See* Stockdale Supp. Decl. ¶ 4.

Fibertech's behalf, however, shows that Verizon, the electric company, and the incumbent cable television company have boxed poles in these towns at a substantially higher rate.[74] A total of 1,111 poles were examined in Agawam, Easthampton, and Northampton as part of that survey, and 323 of those poles (29%) had been boxed by one or more of the telephone, electric, or cable company.[75] These companies, therefore, boxed poles almost 12 times as frequently as Fibertech was allowed to (even though the need to box to avoid expensive make-ready work rises as the number of occupants on the poles increases, and thus one would expect that Fibertech should have presented a greater, rather than reduced, need for boxing).[76] It is simply unrealistic to expect that, absent clear and objective criteria such as proposed by Fibertech, pole owners will fairly make case-by-case determinations regarding use of boxing or extension arms by competitors, as compared with their own affiliates.

As Fibertech explained in its Petition, moreover, even if owners apply prohibitions on the use of boxing and extension arms to all pole occupants, the effect of such a prohibition discriminates against new entrants to the market because they cannot overlash new cables to existing support strand. Verizon suggests that this is not a problem, pointing to its policy of allowing an attacher to overlash another's facilities.[77] But Verizon's argument incorrectly equates overlashing one's own facilities with obtaining permission to overlash someone else's facilities, which, as reflected by Verizon's acknowledgement that "Verizon does not allow anyone to overlash Verizon's

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[74] *See id.* .

[75] *See id.*

[76] *See id.*

[77] Verizon Comments at 4.

facilities,"[78] can be difficult and costly. Moreover, Verizon – as the privileged historical monopoly telephone company – simply missed the point. Even when there may be limited, but costly work-arounds, a categorical prohibition against boxing and extension arms advantages those that are already on the pole, and disadvantages those who are not.

Finally, the electric utilities' argument that the proposed rule would unlawfully require capacity expansion is unfounded.[79] As explained above, even if, as the Eleventh Circuit found in *Southern*, utilities can refuse to expand capacity under circumstances in which they would expand capacity for themselves or their affiliates – a premise we dispute – the use of boxing and extension arms merely permits the efficient use of existing capacity, in the same manner as rearranging existing attachments, and is not itself capacity expansion.[80]

Moreover, if expansion of capacity is interpreted to include the replacement of a pole with a larger pole, the electric utilities' asserted right to refuse to expand capacity includes the privilege to refuse to accommodate a license applicant by replacing a pole of insufficient height. Thus, because virtually all pole lines of any significant length include at least one pole that is not tall enough to accommodate an additional attachment, *Southern* threatens to empower utilities to block the aerial deployment of competitive facilities. The Commission should act swiftly to counter this threat to the continued development of facilities-based competition by adopting Fibertech's proposed rule allowing competitors to find existing pole space by using boxing or extension arms.

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[78] *Id.*, Harrington Declaration at 16.

[79] *See supra* at 18.

[80] *See supra* at 18-20.

B. The Commission Should Establish Shorter Survey And Make-Ready Time Periods.

As discussed above, the supporting commenters only confirmed what Fibertech's Petition made clear – that obtaining timely access to poles and conduit is essential to obtaining and meeting the needs of new customers and thus crucial for facilities-based competition. Thus, contrary to opponents' claims, there is nothing "insufficient," "vague," or "anecdotal" about Fibertech's allegations of unwarranted delay.[81] And Fibertech's proposal for shorter survey and make-ready time periods is necessary to put an end to such pervasive (and well-documented) anticompetitive practices.[82]

Denying that it engages in such conduct, Verizon claims that it "responds to license applications and completes make ready work . . . in a timely and non-discriminatory manner" and that it "most often completes make-ready work for competitors' pole and conduit attachments *more* quickly than it does for its own attachments."[83] But the statistics on which Verizon basis these claims are ambiguous at best. Importantly, there is no way of knowing the purpose or scope of the work on which Verizon relies and, thus, no way to know whether the work performed for Verizon as opposed to its competitors was comparable. By failing to identify the nature of the work performed, Verizon's statistics are most likely skewed by inclusion of Verizon work on non-time-sensitive facilities. The correct and relevant comparison – the time taken to do work necessary to serve new customers – cannot be teased out of the provided statistics. Even if such figures were available, however, the effect of the time it takes to perform

[81] UTC Comments at 11-12.

[82] *See* segTEL at 11; Sigecom at 4.

[83] Verizon Comments at 4.

such work has disparate consequences for attachers as opposed to pole owners. CLECs like Fibertech must pay Verizon up front (often at inflated estimates) before Verizon will begin to perform their work, while Verizon must only cover its actual costs after the fact.

Verizon's supposed concern for the rights of other attachers also provides no basis for rejecting Fibertech's proposals. Verizon is correct that the Commission, in encouraging parties to negotiate terms on which attachers would be notified of modifications, has established a default 60-day notification period.[84] But while Verizon is quick to cite this default notification period to justify maintaining the status quo, Verizon does not, in practice, appear to provide such notice to other attachers. Indeed, Fibertech had never received such a modification notice from Verizon or any other utility in any of the regions in which it operates.[85] Given the apparently minimal industry use of or reliance on this notification period, it should not stand as an obstacle to the pro-competitive proposals offered by Fibertech.

UTC is also correct that in resolving the section 251 dispute between Cavalier Telephone, LLC and Verizon, the Commission declined to adopt a 45-day time-frame for make-ready work.[86] As raised in that case, however, the 45-day time-frame was just one piece of Cavalier's comprehensive proposal whereby "a single third party contractor would simultaneously perform the engineering and make-ready services on behalf of all

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[84] *See Local Competition Order*, 11 FCC Rcd. at 16095-96 (¶ 1209).

[85] *See* Stockdale Supp. Decl. ¶ 5. In practice, licensees are informed of possible upcoming make-ready work through notice from the pole custodian of an upcoming pre-construction survey along the specified route. This notice suffices to inform the licensees that, if they have any interest in adding to their own facilities or rearranging them, they should participate in the survey and state their intentions during that process. *See id.*.

[86] *See* UTC Comments at 11-12.

attached entities on the pole, and render the new attacher a single bill."[87] The FCC declined to adopt that proposal in part because "the process contemplated by Cavalier's proposed language would affect the interests of numerous entities not parties to this Agreement."[88] Moreover, in doing so, the Commission recognized the "need for continued processing of pole attachment applications in an efficient and timely manner" as central to competition and indicated that it would "revisit this issue in the future" if "evidence exists that the pole attachment process is not functioning to ensure that such access is made available expeditiously."[89] Because the evidence now shows that the current process does not ensure the timely survey and make-ready periods needed for expeditious access, Fibertech urges the Commission to revisit this issue and adopt Fibertech's proposal.

C. The Commission Should Require Utilities To Allow Approved Contractors To Perform Field Surveys And Make-Ready Work.

Fibertech has proposed a rule that would require pole and conduit owners to allow competitors to hire owner-approved contractors to perform field surveys, make-ready determinations, and make-ready work if the owner cannot or will not meet the relevant legal deadlines. Such a rule removes the anticompetitive effects of pole owner delays by making clear that if a pole owner cannot complete work in a timely manner, it must allow a CLEC to use qualified personnel to do the work.

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[87] *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd. 25887, 25963 (¶ 140) (2003).

[88] *Id.* at 25965 (¶ 142).

[89] *Id.* (¶ 143).

In opposing that rule, the electric utilities claim that it should not apply to them because the utility has the primary responsibility to ensure the safety and reliability of electric facilities and allowing attacher-hired contractors presents too great a risk of damage to their facilities.[90] But the utilities fail to explain why any safety, reliability and security concerns could not be addressed by a stringent pre-approval process whereby utilities could ensure that contractors had sufficient qualifications and could pass any necessary security check. In addition, any remaining liability concerns could be adequately addressed through indemnification provisions. Verizon's objections to the rule are based on a fundamental misunderstanding of Fibertech's proposal. Contrary to Verizon's claim, Fibertech does not propose the type of "single crew" rule that the Commission has declined to adopt in prior decisions.[91] Rather Fibertech proposes that, where the pole or conduit owner is unable to complete the work in a timely manner, attachers be permitted to hire contractors that have been approved by the owner as qualified to perform work that needs to be done.

D. The Commission Should Reaffirm By Rule That Utilities Are Required To Permit Installation Of Drop Lines Without Prior Licensing.

Fibertech proposes that the Commission establish a rule codifying its *Mile-Hi* decision[92] and exempting the installation of NESC-compliant drop lines to serve new

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[90] *See* AEPSC et. al. Comments at 19-21; UTC Comments at 12-13.

[91] Verizon Comments at 6.

[92] *See Mile Hi Cable Partners et al. v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450, 11460-61 (¶ 19) (2000) (noting the cable operator's argument that "time constraints … and the delays inherent in the application process for attachments, make it unreasonable to include drop poles in the regular applications process" and concluding that "[f]or drop poles, therefore, notification to [the pole owner] of [the attacher's] use of a drop pole is reasonable but [the attacher] need not wait for approval prior to attaching").

customers from pre-approval, where such installation would not impair safety or reliability and the attacher promptly notifies pole owners of the installation once it is completed. That rule would make clear that CLECs are permitted to compete on more equal footing with ILECs that need not pursue these licensing processes or incur the associated costs with respect to drop lines.

Verizon argues that it requires *all* attachers to obtain licenses before installation, citing the need to prevent attachment of drop lines on pole space that has already been licensed to another attacher and to prevent exceeding the maximum permissible loads.[93] Verizon fails to reconcile its position with the Commission's decision in *Mile-Hi*. Moreover, other parties in Verizon's position have overcome these obstacles, and follow the *Mile-Hi* precedent. Qwest and many electric utilities, for example, follow Fibertech's proposed practice. Indeed, as AEPSC explains, "[t]he reality of the matter is, however, that many pole-owners, including the Utilities, allow these attachments without application in certain circumstances where reliability will not be adversely affected, but do require notification either before or after attachment and payment of appropriate rental fees. Such practices ensure that attaching entities can meet response deadlines without sacrificing pole reliability."[94] Fibertech's proposed rule would simply codify this practice. It would not adversely affect pole safety or reliability.

While Verizon heralds its expedited licensing procedure, that procedure does not actually address the problem at hand. Verizon's expedited licensing procedure is about

[93] Verizon Comments at 7.

[94] AEPSC et. al. at 21 (emphasis omitted).

new poles, not drop lines,[95] and, in any event, the procedure is insufficient to level the playing field since CLECs, but not ILECs, must endure the licensing procedure and incur any associated costs.

Finally, Fibertech's drop line proposal is not an attempt to legitimize unauthorized attachments after the fact or otherwise endorse a practice of attachment without notification.[96] Under Fibertech's proposal, as in the analogous cable context, once the drop line is installed (where safe and reliable to do so) the attacher would notify the pole owner so that the owner can inspect the installation and commence collection of rental fees. Indeed, Fibertech's proposals are designed to prevent unauthorized attachments and other self-help by ensuring that competitors have reasonable and timely access to poles and conduit.

E. Conduit Owners Should Be Required To Permit CLECs To Conduct Or, At Least, Observe Record Searches And Manhole Surveys.

As Fibertech's Petition explained, inaccurate reports by ILECs concerning conduit availability force CLECs to incur significant delays and costs. To remedy this, Fibertech proposed that that the Commission require conduit owners to allow CLECs to conduct record surveys and manhole searches, and/or to observe such searches and surveys done by the owner on the CLEC's behalf.[97]

[95] Verizon Comments, Harrington Declaration ¶¶ 22-23.

[96] *See* AEPSC et. al. at 21. While there have been instances in the past in which Fibertech has made unauthorized attachments, such attachments did not occur in the drop-line context and were in response to substantial pole-owner delays.

[97] *See* Petition at 24-29.

At the Commission, Verizon has responded with a claim that Fibertech's proposed rule is unnecessary. In the field, Verizon has demonstrated quite the opposite. In response to a Fibertech request for a manhole survey in Albany, Verizon states:

> Out of necessity and due to the fact that Fibertech has complained to the FCC about "delays" with regard to Pole and Conduit applications, I am now forced to strictly adhere to the critical dates on our Pole and Conduit Occupancy Agreement procedures. My required due date to you with a straighline drawing is 3/15/06 (instead of your 2/2/06 request).[98]

This email demonstrates that Verizon does not hesitate to manipulate the make-ready process for its own competitive purposes – something Verizon could not do if Fibertech could perform its own surveys or searches. This stark example of an ILEC's willingness to use its control of conduit to harm a competitor is alone sufficient to warrant the rulemaking Fibertech has requested.

In any event, none of the substantive objections to Fibertech's proposal are persuasive. Verizon argues that allowing CLECs access to conduit would disclose proprietary information.[99] But, as pointed out in Fibertech's Petition, aerial inspection of poles reveals the same kind of information in the analogous above-ground context. Moreover, the information identifying which companies have facilities in the conduit is revealed when the CLECs subsequently enter the manholes to install their facilities, so the proprietary information that Verizon allegedly seeks to protect is in any event disclosed to the exact same party.

Several electric utilities express fears that Fibertech's proposal would raise serious security concerns by allowing third parties to "rummag[e] through electric utility

[98] Exhibit 1.

[99] Verizon Comments at 8.

conduit records."[100] While Fibertech understands the importance to national security of protecting critical information about the nation's infrastructure, we submit that the utility could take measures – such as pre-approving CLEC employees or contractors – to adequately protect such information.[101] Since utilities often use these same contractors, many of these contractors and their employees have already presumably been vetted sufficiently to protect national security.

Verizon's assertions that it provides CLECs with reasonable access to information regarding the availability of conduit are not supported by the evidence. For example, Verizon's claim that it already provides the attacher notice of the survey and permits attachers to accompany Verizon surveyors on manhole searches is, at best, misleading.[102] In actuality, Verizon's practice, which has varied widely over different regions, generally precludes CLEC access to manholes.[103] In New England and Buffalo, Fibertech is allowed to attend the survey but not allowed to enter the manhole or otherwise test Verizon's report regarding availability of conduit.[104] In Pittsburgh, Fibertech is allowed to accompany Verizon surveyors, must remain outside of the manhole, and is generally

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[100] Ameren et. al. Comments at 14-15; *see also* AEPSC et. al. Comments at 22;.

[101] As a practical matter, because ILECs and CLECs typically use the same contractors, adopting Fibertech's proposal likely would not result in access for a large number of additional personnel.

[102] Verizon Comments at 9; *see id.*, Harrington Declaration ¶ 30.

[103] *See* Stockdale Supp. Decl. ¶ 6.

[104] *See id.* Notwithstanding Ms. Harrington's Declaration, Verizon is well-aware that its current practice in New England and Buffalo does nothing to resolve the precise problem that Fibertech's proposed rule is intended to address. *See* Stockdale letters to Verizon Buffalo and New England detailing Fibertech's objections to Verizon's practice (attached hereto as Exhibit 5).

not given sufficient notice of the survey to make accompaniment possible.[105] In Albany, Fibertech had historically been allowed to perform manhole surveys (albeit in the presence of a Verizon inspector). It is not clear what access Verizon will permit in Albany in the future, however, as the email quoted above also promises "[m]any changes."[106] Finally, even in Verizon's new attachment agreements (discussed further below), Verizon has interpreted the provision stating that the "licensee may accompany licensor . . . [on] manholes survey" as allowing accompaniment along the route but not in the manhole. Properly understood, therefore, Verizon's conduit search and manhole survey practices do nothing to alleviate CLECs' inability to confirm the truth or falsity of Verizon's report of conduit availability – the precise problem that Fibertech's proposal seeks to remedy.

Verizon also claims that it locates and provides conduit records within 5 days of a request. Even if this claim were true, it fails to provide any meaningful information regarding the timeliness of Verizon's responses to conduit applications. An inspection of the actual manhole is necessary to determine conduit availability. The record search is simply a preface to the physical survey.[107]

F. Conduit Owners' Fees For Searches And Surveys Should Be Capped At Reasonable Levels

To protect CLECs from arbitrary and excessive charges for record searches and manhole surveys, Fibertech requested that the Commission establish a firm cap on

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[105] *See* Stockdale Supp. Decl. ¶ 6.

[106] Exhibit 1.

[107] *See* Stockdale Supp. Decl. ¶ 6.

charges imposed by conduit owners when these tasks are performed by conduit owners to determine the availability of conduit on a CLECs' behalf.[108]

In objecting to this proposal, Verizon alleges that Fibertech is complaining about Verizon's assessment of estimated charges in advance of survey and make-ready work. Verizon suggests that if this is Fibertech's concern, Fibertech could subscribe to a different pole attachment agreement with Verizon. The alternate agreement provides set fees, or "unit costs" for pole surveys and make-ready work. Verizon's proposal is misguided. First, setting unit costs for *pole* surveys and make-ready work fails to address the problem Fibertech has raised – excessive charges for *conduit* work. Second, Verizon's alternate agreement would have governed many areas in addition to pole survey and make ready costs, with terms highly unfavorable to Fibertech.[109] For these reasons, subscribing to Verizon's alternate pole agreement is no solution to the problems Fibertech has documented. Verizon's concession that unit costs are appropriate in some instances, however, undermines any claim that each and every fee must be based on actual cost.[110]

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[108] *See* Petition at 29-30.

[109] Fibertech declined to enter the new pole attachment agreements after Verizon rejected every single change that Fibertech requested be made to the form contract. As a result, the new agreements contained highly unfavorable terms, including: locking Fibertech into a 180-day time frame for make-ready work, unduly high unit charges of 5 to 7 times the amount that Fibertech charges other companies to perform the same work, and requiring Fibertech to pay charges regardless of whether Fibertech disputed the amount. *See* Stockdale Supp. Decl. ¶ 7.

[110] *See* AEPSC et. al. Comments at 24.

Qwest points out that searches and survey charges have already been deemed reasonable by state regulators.[111] But this is not necessarily true in states that have declined to regulate pole and conduit access. The FCC can and should step in to this vacuum to provide certainty and ensure that searches and survey charges are reasonable.

G. Pole Owners Should Be Required To Provide Detailed Invoice Support For Their Cost-Based Fees.

Fibertech's proposed rules would require that pole owners provide full documentation for any survey or make-ready charges to competitors. Requiring that such information be provided up front will enable CLECs to determine the basis for such charges, without having to either pay invoices that appear excessive or withhold payment and hold risky outstanding balances until the owner provides such documentation.

Pole owners objecting to the rule claim that it is unnecessary for a variety of reasons – all of which are unconvincing. Qwest, for example, argues that state commissions already review billing practices and that any remaining problems can be resolved through the complaint process.[112] But complaint proceedings are not a sensible or efficient way to resolve disputes that could be avoided by a simple rule requiring support for cost-based fees.[113] Indeed, the limited discovery available through the FCC's complaint process and the near-summary judgment standard for complaint pleading, for

[111] *See* Qwest Comments at 8.

[112] *Id*. at 9

[113] Moreover, given the Commission's requirement that a formal complaint include a complete and supported statement of facts that, if proven, would warrant relief, *see* 47 C.F.R. §1.721, and given the limited discovery available in formal complaint proceedings, it would be difficult, if not impossible, to use those proceedings to successfully challenge a vague or incomplete bill.

example, makes even the pursuit of an FCC complaint difficult without adequate documentation of charges.

Verizon claims that the rule is unnecessary because its invoices for surveys and make-ready work already provide substantial detail.[114] As seen on the attached Verizon bill,[115] however, the detail is far from sufficient to allow a competitor to understand the basis for certain charges. For example, the invoice fails to explain or otherwise breakdown the charge labeled "Contractor's Services." Fibertech frequently questions this amount because the charges are often much higher than Fibertech would pay its own contractors to perform the work. Such disputes could be avoided if the invoices showed the per unit cost (*e.g.,* cost per foot or cost per hour) for such contractor services. Similarly, the invoice provides no explanation for line item labeled "Additional Charge,"[116] leaving competitors no way of knowing what work or costs are included.

H. The Commission Should Permit CLECs To Use Utility-Approved Contractors To Work In Manholes Without Utility Supervision.

Fibertech's Petition calls on the Commission to adopt a requirement that conduit owners permit owner-approved contractors to work in manholes on CLECs' behalf without supervision. A number of commenters object to that proposal, claiming that such supervision requirements are necessary to ensure safety and prevent damage to owners' and other attachers' facilities.[117] That such fears are exaggerated is demonstrated by the fact that a number of conduit owners – including commenters in this proceeding – do

[114] Verizon Comments at 10-11.

[115] *See* Verizon Billing Statement (Sept. 16, 2005) (attached hereto as Exhibit 6).

[116] *See id.*

[117] *See e.g.*, Verizon Comments at 11-12; AEPSC et. al. Comments at 23-24; UTC Comments at 17.

allow CLEC-hired contractors to work in manholes without supervision.[118] In addition, as explained in the Petition, standard occupancy agreements include indemnification and insurance provisions that protect the owners from any damage to their facilities.[119]

As explained in Fibertech's Petition, moreover, the same contractors typically perform work for both CLECs and conduit owners. These contractors are apparently sufficiently competent to be retained to perform work on behalf of conduit owners, yet still must be supervised at CLEC expense when performing work for CLECs. Furthermore, the very conduit owners that require supervision of CLEC work deny CLECs the same opportunity to supervise (or charge for the supervision of) work done by or on behalf of the owner in the presence of CLECs' facilities. The conduit owners objecting to the proposed rule fail to offer any explanation why contractors can be trusted not to damage facilities when working for the owner but present an unacceptable risk of damaging facilities when working for the owners' competitors. There is no reason why this competitively unbalanced situation should be allowed to persist.

Most importantly, however, Fibertech reiterates that the problem under the current system is not periodic inspections or even supervision per se, but the attendant dependence on conduit owner supervisors' schedules and liability for conduit-owner charges. Thus, under the proposed rule, owners could retain the option to observe CLEC contractors' work, so long as the CLEC work is in no way contingent upon the presence of the owner's employee and the owner bears any costs. As noted in the Petition,

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[118] *See* Qwest Comments at 10 ("Generally, Qwest does not require that make-ready work by an approved contractor be supervised by a Qwest employee contractor;") *See also* Petition at 33-34.

[119] Petition at 33-34.

Fibertech would not object to a requirement that the conduit owner be notified of where and when CLEC contractors would be working.[120]

I. The Commission Should Require ILECs To Provide CLECs With Reasonable Access To Building-Entry Conduit.

As Fibertech's Petition made clear, access to existing conduit is critical to a competitor's ability to serve building occupants. Thus, Fibertech proposed that the Commission adopt a rule requiring ILECs, where space is available to (1) permit CLECs to install cable into building-entry conduit, (2) install innerducts and allow CLEC cable to be placed within them, or (3) allow CLEC cable to be pulled through the interstices among innerducts.[121]

Misunderstanding Fibertech's proposal, UTC points out that the FCC has already addressed the issue of reserved building conduit.[122] At issue here, however, is not the reservation of building conduit, but the incumbents' overbroad definition of occupied conduit. In any event, the fact that problems remain despite Commission decisions on reserved conduit only supports Fibertech's request for rulemaking relief.

Objecting to Fibertech's proposed rule, certain ILECs argue that cable cannot be added to innerduct or pulled through the interstices among innerduct without a serious risk of damaging existing cable.[123] Such cases are the exception rather than the rule.

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[120] *Id.* at 34 n.32.

[121] The Real Access Alliance is correct that neither this rule, nor any of the proposed rules, "implicate the rights of property owners." Comments of the Real Access Alliance at 1-2. In fact, Fibertech's proposal would increase property owners' choices by liberalizing ILEC-owned conduit access and enabling buildings to be served by multiple providers.

[122] *See* UTC Comments at 18.

[123] *See, e.g.,* Verizon Comments at 12; Qwest Comments at 11-12.

Verizon's claim, for example, that "there [i]s no . . . feasible way" to place cable in the middle of existing innerduct without damage, is belied by its own practice in Albany, where Verizon's outside plant managers have allowed Fibertech to install fiber through innerduct interstices. Moreover, Fibertech's proposed rule would create incentives for utilities to deploy cable and innerduct in a manner that maximizes, rather than minimizes, space available in building entry conduit.

CONCLUSION

For the above reasons, Fibertech respectfully requests that the Commission grant its petition for rulemaking and adopt the proposed rules to ensure non-discriminatory access to poles and conduit.

Respectfully submitted,

John T. Nakahata
Brita D. Strandberg
Stephanie S. Weiner
Christopher P. Nierman
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

Counsel for Fibertech Networks, LLC

Charles Stockdale,
General Counsel
Robert T. Witthauer,
Deputy General Counsel
FIBERTECH NETWORKS, LLC
140 Allens Creek Road
Rochester, NY 14618

March 1, 2006

EXHIBIT 1

JANUARY 30, 2006 EMAIL FROM TRIXIE VOELLINGER

From: Voellinger, Trixie
Sent: Monday, January 30, 2006 2:02 PM
To: Baase, James; Lonobile, Kim; Stockdale, Charles
Subject: FW: Manhole Survey for State St. Albany 2/2/06
Importance: High

FYI - See Below -

Trixie Voellinger
Fibertech Networks
Phone: (585) 697-5133
Fax: (585) 242-9807
E-mail: tvoellinger@fibertech.com

-----Original Message-----
From: keith.j.rogers@verizon.com [mailto:keith.j.rogers@verizon.com]
Sent: Monday, January 30, 2006 12:32 PM
To: Voellinger, Trixie
Cc: chip.e.lawrence.jr@verizon.com;
mike.scorzelli@syracuseutilities.com; Enright, Bob
Subject: Re: Manhole Survey for State St. Albany 2/2/06

Many changes commencing in 2006. Out of necessity and due to the fact that Fibertech has complained to the FCC about Verizon "delays" with regard to Pole and Conduit applications, I am now forced to strictly adhere to the critical dates on our Pole and Conduit Occupancy Agreement procedures. My required due date to you with a straightline drawing is 3/15/06 (instead of your 2/2/06 request). Once completed, I will forward to you and then we can set up the visual at that time.
Thanks.

EXHIBIT 2
SUPPLEMENTAL DECLARATION OF CHARLES STOCKDALE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Rulemaking of Fibertech Networks, LLC	)	RM- 11303

SUPPLEMENTAL DECLARATION OF CHARLES STOCKDALE

I, Charles Stockdale, do hereby declare under penalty of perjury:

1. Since September 2000, I have served as General Counsel of Fibertech Networks, LLC ("Fibertech"). Before joining Fibertech, I served as Deputy General Counsel for Operations for Adelphia Communications Corporation, where I dealt with various pole attachment matters. Prior to that, I served as counsel to the Cable Television and Telecommunications Association of New York, where I represented the cable television industry on matters relating to access to utility poles and conduit. As General Counsel of Fibertech, I am familiar with Fibertech's efforts to deploy its network using utility-owned and controlled facilities such as poles and conduit. Among other things, I have negotiated pole attachment agreements for Fibertech and coordinated Fibertech's response to certain ILEC and electric utility charges and practices that Fibertech believes are unreasonable. This supplemental declaration is offered simply to correct a number of the inaccurate or distorted factual assertions contained in comments opposing Fibertech's Petition.

2. *First*, despite assertions to the contrary, Fibertech has indeed had difficulty accessing poles from electric utilities, and not simply from ILECs. To gain reasonable

access to poles, for example, Fibertech has been forced to litigate against five different electric utilities in four different states since it began operations five years ago. Moreover, Fibertech has filed 21 pole license applications with Narragansett Electric Company in Rhode Island during the period of October 21, 2005, through November 23, 2005. Although these applications have been outstanding for periods of between 98 and 131 days, Narragansett has issued make-ready estimates for only three of the 21 applications.

3. *Second*, comments from pole owners severely understate the use of boxing and extension arms. In truth, pole owners have frequently used these techniques to avoid the delays and costs of make-ready work. For example, in 2003, Fibertech commissioned a survey of approximately 60 route miles of pole plant in and around Springfield, Massachusetts. Fibertech had attached to none of the poles along the route. Of the 2,324 poles examined, Verizon, the electric company, and/or the cable television company had boxed 622 (or 26.8%). Boxed poles are common in all the markets in which Fibertech has deployed facilities.

4. *Third*, various comments suggest that decisions whether to allow boxing or extension arms are based on fair and competitively neutral evaluations. The facts, however, contradict this suggestion. Verizon's comments, for instance, note that Verizon has allowed Fibertech to box 14 poles in Agawam, Massachusetts, and one pole each in Easthampton and Northampton, Massachusetts. While that may be true, Fibertech has attached to 253 poles in Agawam, 184 poles in Easthampton, and 214 poles in Northampton. Thus, it was allowed to box approximately 2.5% of the poles it attached to in Agawam, Easthampton, and Northampton. On the other hand, the 2003 Springfield-

area pole survey conducted on Fibertech's behalf shows that Verizon, the electric company, and/or the incumbent cable television company have boxed 29% (323 of 1,111) of the poles surveyed in these towns. These companies, therefore, boxed poles almost 12 times as frequently as they allowed Fibertech to do so (even though the need to box to avoid expensive make-ready work rises as the number of occupants on the poles increases, and thus one would expect that Fibertech should have presented a greater, rather than reduced, need for boxing).

5. *Fourth*, Verizon's reliance on the Commission's default 60-day notification period for modifications as a justification for rejecting Fibertech's proposals overlooks the reality that Verizon does not, in practice, appear to provide such notice to other attachers. Indeed, Fibertech has never received such a modification notice from Verizon or any other pole owner. In practice, licensees are informed of possible upcoming make-ready work through notice from the pole custodian of an upcoming pre-construction survey along the specified route. This notice suffices to inform the licensees that, if they have any interest in adding to their own facilities or rearranging them, they should participate in the survey and state their intentions during that process.

6. *Fifth*, Verizon's assertions that it provides CLECs with reasonable access to information regarding availability of conduit are not supported by the evidence. For example, although Verizon claims that it "permits attachers to accompany Verizon's surveyors on manhole surveys," in New England and Buffalo Fibertech is not allowed to enter the manhole during such surveys or otherwise confirm the accuracy of Verizon's report regarding availability of conduit. Furthermore, in Pittsburgh, Fibertech must remain outside the manhole and is generally not given sufficient notice of the survey to

make even this limited form of participation possible. Verizon also claims that it locates and provides conduit records within 5 days of a request. Even if this claim were true, it fails to provide any meaningful information regarding the timeliness of Verizon's responses to conduit applications. Before conduit can be determined to be available, a manhole inspection must be conducted. The record search is simply a preface to the physical survey. Finally, Verizon's recent response to Fibertech's filing of the instant Petition undercuts its claims of fair play. According to an email from Verizon (attached as Exhibit 1 to these Reply Comments), Verizon has altered its practice in Albany with regard to manhole surveys at least in part "due to the fact that Fibertech has complained to the FCC about Verizon 'delays' with regard to Pole and Conduit applications."[1] In apparent retaliation for Fibertech's request for regulatory relief, Verizon delayed a manhole survey requested for February 2, 2006 until March 15, 2006, and appears to have changed its policy in Albany to prevent Fibertech from observing the survey to confirm its accuracy.

7. *Sixth*, Fibertech requested that the Commission establish a firm cap on charges imposed by conduit owners for record searches and manhole surveys performed to determine the availability of conduit on a CLECs' behalf. In objecting to Fibertech's proposal, Verizon suggests that Fibertech could subscribe to a different pole attachment agreement with Verizon. Fibertech, however, attempted to negotiate but ultimately declined to enter a new pole attachment agreement after Verizon rejected every single change that Fibertech requested be made to the form contract. The new agreements contained highly unfavorable terms, including: locking Fibertech into a 180-day time

[1] *See* E-mail from Trixie Voellinger to James Basse, Kim Lonobuile, and Charles Stockdale (Jan. 30, 2006) (attached as Exhibit 1 to these Reply Comments).

frame for make-ready work, unduly high unit charges of 5 to 7 times the amount that Fibertech's construction subsidiary charges other companies to perform the same work, and requiring Fibertech to pay charges regardless of whether Fibertech disputes the amount.

Executed on February 28, 2006

Charles Stockdale

EXHIBIT 3
DECLARATION OF JAMES BAASE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Rulemaking of Fibertech Networks, LLC	))))))	RM - 11303

DECLARATION OF JAMES BAASE

I, James Baase, hereby declare under penalty of perjury:

1. My name is James Baase, and I serve as Vice President of Engineering for Fibertech Networks, LLC.

2. Approximately two months ago I traveled to the Town of Amherst, outside of Buffalo, New York, to look at two possible pole lines that Fibertech would use for the deployment of lateral extensions of Fibertech's Buffalo-area network to reach new Fibertech customers. In doing so, I noticed that Verizon had employed the technique of "boxing" to install at least one cable to almost every pole along those pole lines. "Boxing" is a technique by which a cable is attached to the side of the pole opposite the majority of attached cables. By boxing a pole, an attacher avoids the need to find or create space on the side of the pole where the majority of cables are attached.

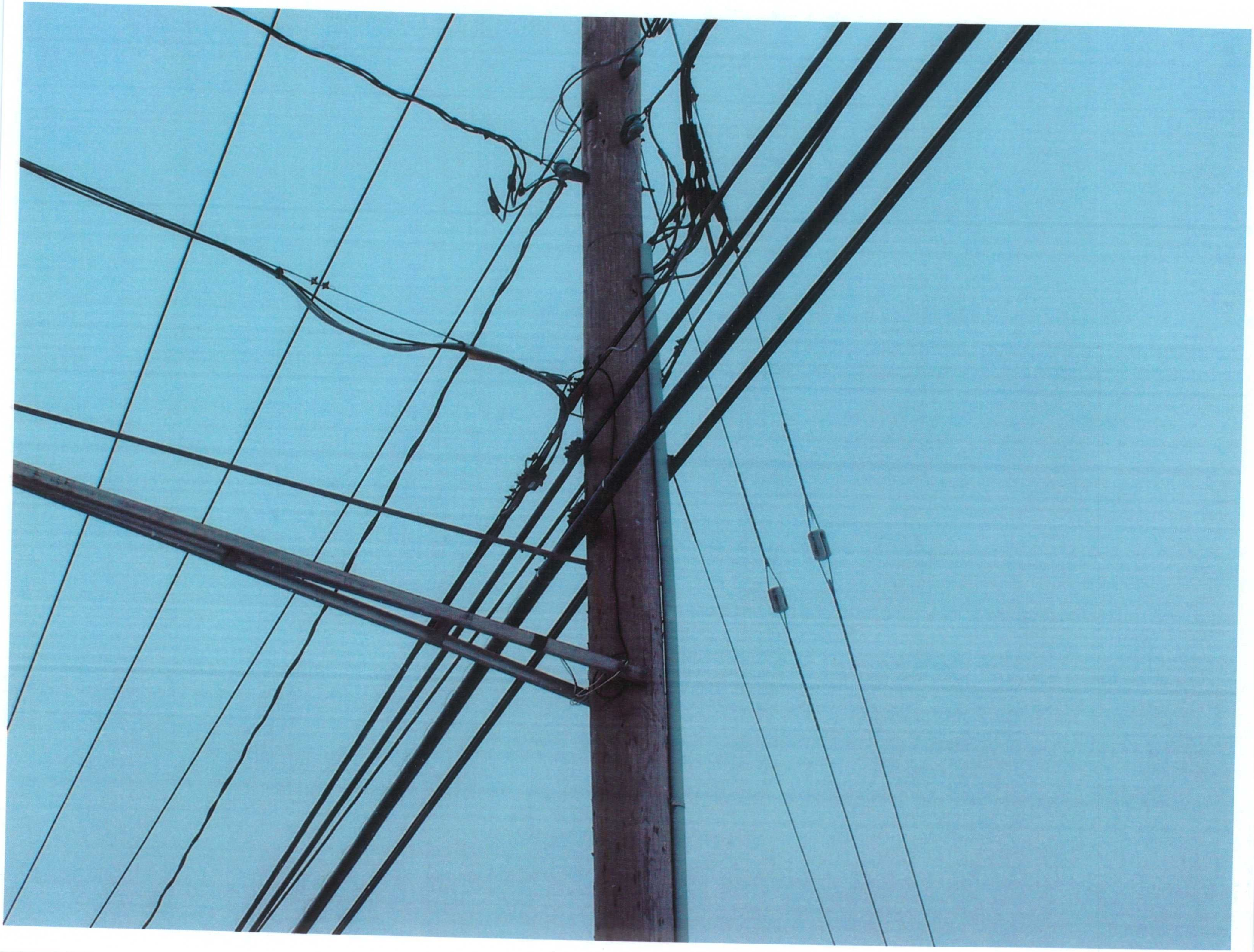
3. At my direction, Fibertech employees prepared profiles of the poles along these pole lines and photographed the poles. I am attaching ten of these photographs to this declaration. The pole profiles describe the physical characteristics of each pole, including the ownership and location on the pole of all communications lines. These pole

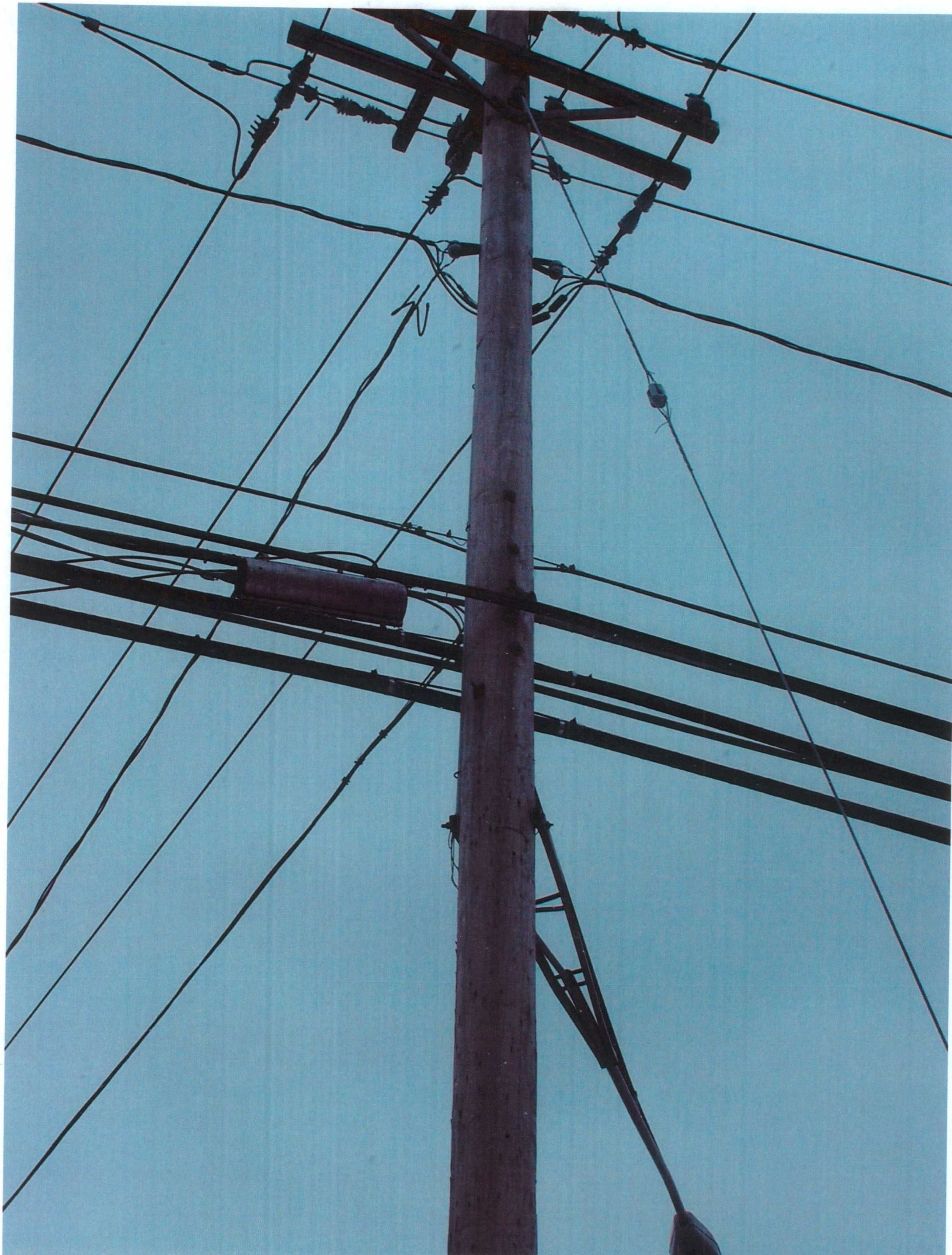
profiles and photographs, which confirm my personal observations, show that Verizon has boxed 48 out of 52 distribution poles along the 1.2 miles of Niagara Falls Boulevard running south from County Route 356. Verizon has also boxed 60 out of 67 distribution poles along the 1.9 miles of County Route 324 running easterly from Hopkins Road.

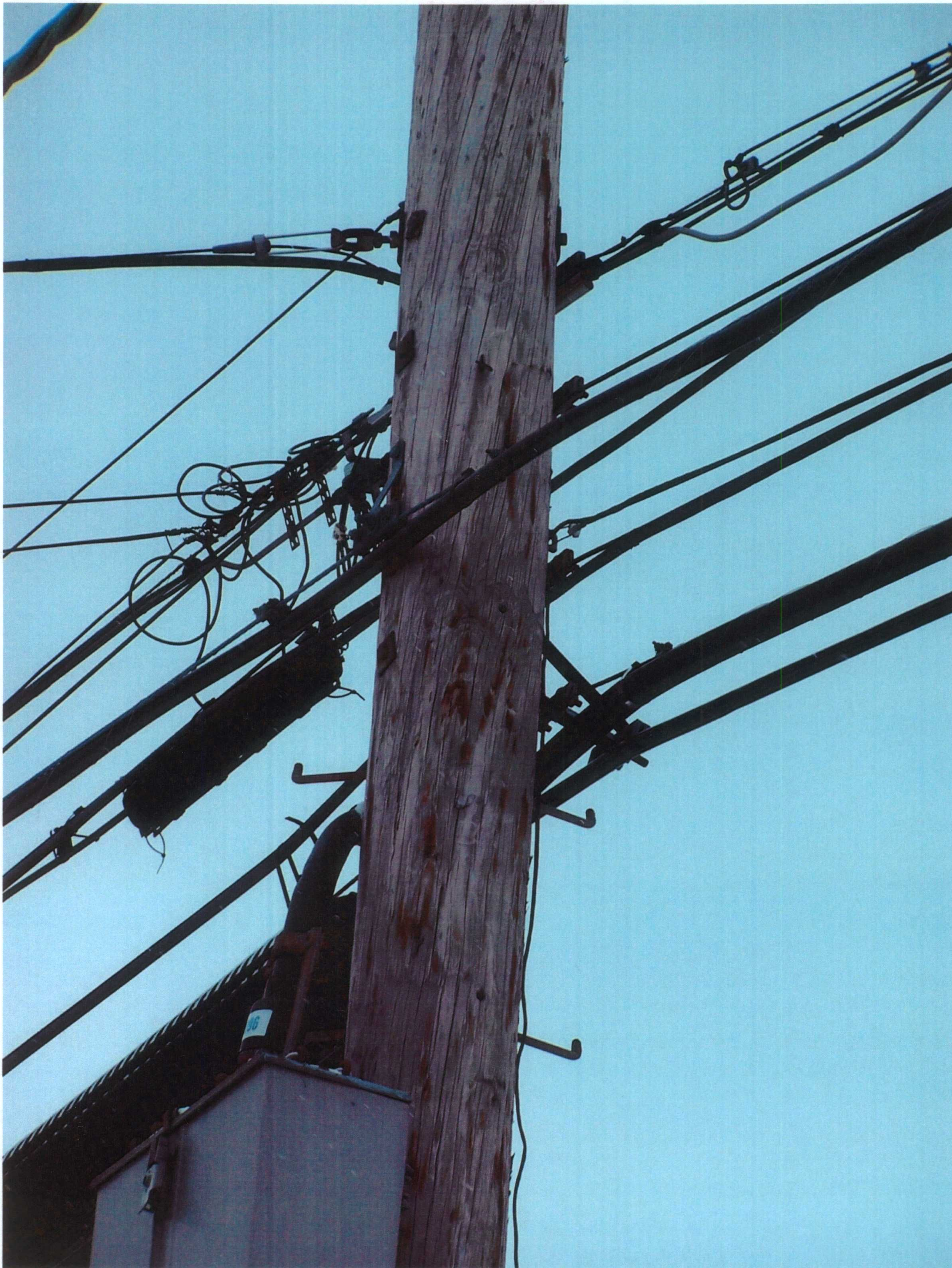
4. As the attached photographs reflect, the poles along both of these lines are heavily laden with communications and electrical facilities, and Verizon therefore avoided high make-ready and pole replacement costs by boxing the poles along these routes. In my opinion, Verizon's use of boxing as described herein is inconsistent with its assertion that "Verizon does not use boxing as a general construction practice."

Respectfully submitted,

James Baase
Vice President of Engineering
Fibertech Networks, LLC







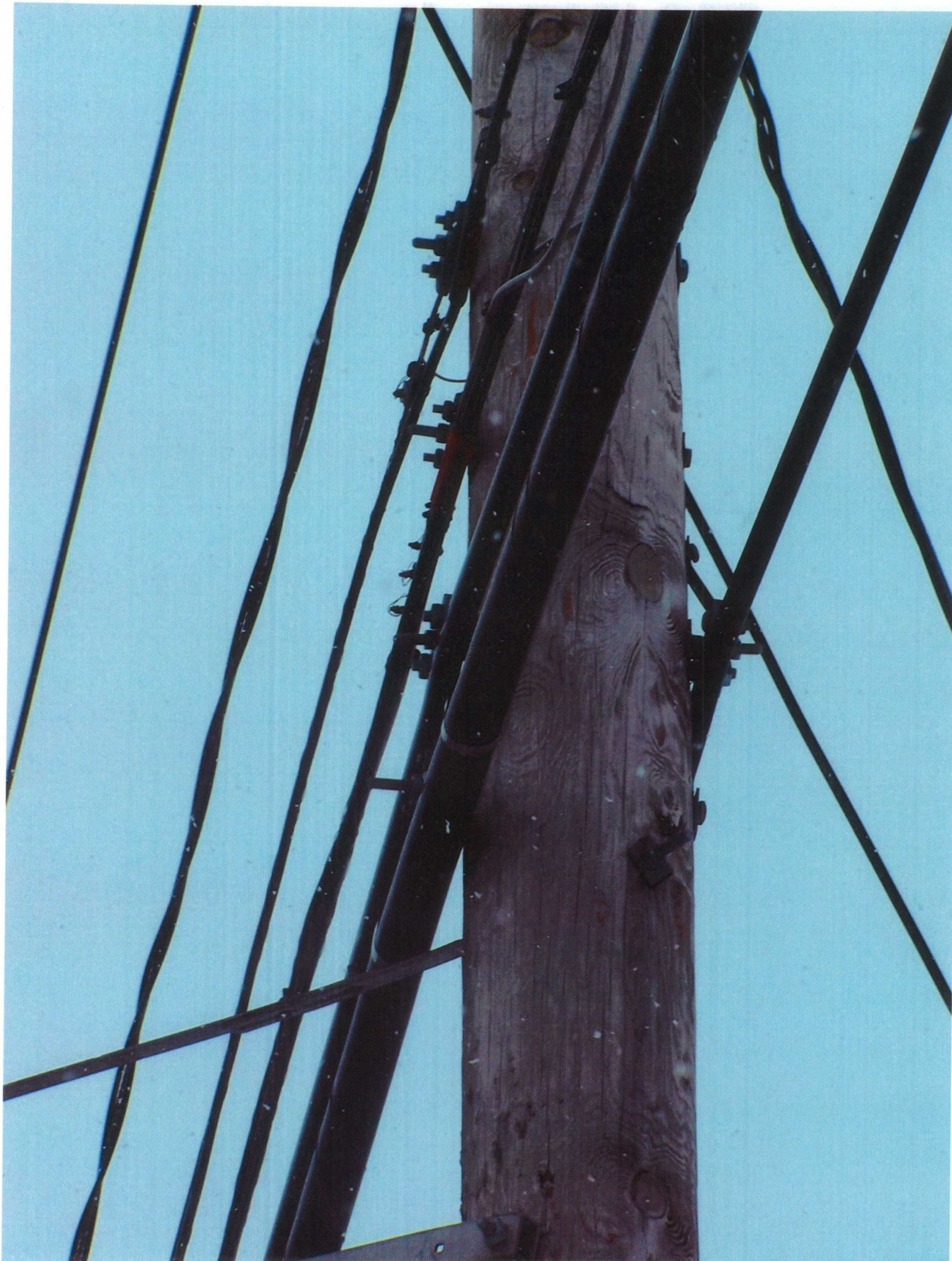


EXHIBIT 4
DECLARATION OF ROBERT ENRIGHT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Rulemaking of Fibertech Networks, LLC	))))))	RM - 11303

DECLARATION OF ROBERT ENRIGHT

I, Robert Enright, hereby declare under penalty of perjury:

1. My name is Robert Enright, and I serve as Project Manager for Fiber Technologies Networks, L.L.C. This declaration rebuts Verizon's assertions that "Verizon permits extension arms or brackets in those limited cases when it is necessary to extend the cable away from the pole in order to obtain sufficient clearance from a building or tree or to improve cable alignment," or "to compensate for a pole that is out of alignment," and that it "does not permit extension arms to be used merely to increase the capacity on the pole."[1]

2. The six photographs attached to this declaration demonstrate that, contrary to its assertions, Verizon does not use extension arms only to avoid trees and buildings or to improve pole alignment, but rather Verizon uses extension arms to maximize pole capacity, thereby avoiding make-ready work. These poles are located on Route 85 in Milford, Massachusetts, approximately 200 yards south of the Interstate 495 overpass.

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[1] Verizon's Opposition to Fibertech's Petition for Rulemaking, RM-11303, at 3, filed January 30, 2006.

3. The photograph attached as Exhibit A depicts a southward-facing view along Route 85, showing in the foreground Pole 81, to which Verizon has attached its fiber-optic cable by means of a downward-pointing extension arm. The next pole, visible in the background of Exhibit A, is Pole 82, to which Verizon has attached its fiber-optic cable by means of an upward-pointing extension arm. The photograph attached as Exhibit B faces north and pictures Pole 82 in the foreground and Pole 81 in the distance. The photograph attached as Exhibit C shows more clearly the equipment attached to Pole 81 and reveals that all other communications lines attached to the pole are attached directly to the pole, without use of an extension arm. Similarly, the photograph attached as Exhibit D shows that all communications lines on Pole 82 are attached directly to the pole. Exhibits C and D also show that the poles hold heavy Verizon trunk lines, which render it difficult to add a new cable by means of overlashing. The photographs attached as Exhibits E and F identify the pole numbers and demonstrate that Verizon and Massachusetts Electric Company jointly own the poles.

4. Exhibits A through D demonstrate clearly that Verizon's use of extension arms to attach its new fiber-optic cable was not related to a need to avoid a building or a tree and was not related to any issue concerning pole alignment. The photographs show that neither the poles nor the lines that they support are located near buildings or trees. Moreover, they are not out of alignment, but rather are in a straight line.

5. These photographs cast doubt on Verizon's claims that it only uses extension arms to avoid a building or tree or to adjust for pole misalignment. Instead, the only apparent purpose of using the extension arms depicted in the attached photographs was to avoid the time and cost of make-ready work that otherwise would have been required to

deploy the Verizon's fiber-optic cable. Indeed, these photographs clearly show that the alignment and location of these poles allowed all of the other communication lines to attach directly to the pole without the need for extension arms.

Respectfully submitted,

Robert Enright
Project Manager
Fibertech Networks, LLC

EXHIBIT A


02/08/2006

EXHIBIT B


02/08/2006

EXHIBIT C


02/08/2006

EXHIBIT D


02/08/2006

EXHIBIT E


81
02/08/2006

EXHIBIT F


MECO
82
NET&TCo
02/08/2006

EXHIBIT 5
LETTERS FROM CHARLES STOCKDALE TO VERIZON

Fibertech

716-697-5100
716-442-8845
140 Allens Creek Road
Rochester, NY 14618

July 23, 2001

Mr. James A. Olson
Engineering Manager
Verizon-New York, Inc.
65 Franklin Street
Buffalo, NY 14202
FAX No. (716) 845-6584

By Facsimile

Dear Mr. Olson:

This responds to the e-mail you sent Frank Chiaino on Friday, July 20, 2001. As you know, a meeting had been scheduled for 1:00 p.m. that day at which Mr. Chiaino would be able to discuss with representatives of Verizon various means of permitting Fiber Technologies Networks, L.L.C. ("FTN") to proceed with construction of its Buffalo-area network, including details relating to the possible temporary use of "maintenance" ducts. In your e-mail, you reported that all the Verizon directors Mr. Chiaino was to meet with were unavailable, that FTN will not be permitted to use "maintenance" duct, and that "[p]ower rodding will not be allowed in multi-tile duct". You proposed "schedul[ing] our work more closely … as [FTN] ha[s] been asking for … for some time now".

A. BACKGROUND

1. Verizon's System of Delay in Buffalo

On July 25, 2000, FTN (then "Fiber Systems") completed its application for access to Verizon conduit in the City of Buffalo. According to the Conduit Occupancy Agreement ("Agreement") between Verizon and FTN, the pre-construction survey of the requested conduit should have been completed by September 8, 2000 (Agreement § IV(4)(k)(l)), and, because Verizon did not notify other entities occupying the conduit section of proposed modifications (to our knowledge), the make-ready should have been completed on or shortly after December 7, 2000 (Agreement § IV(4)(k)(4)). The make-ready still is not done, and FTN has been able to deploy less than two miles of fiber in the approximately 19 miles of underground plant designed for its Buffalo network. The resulting postponement in completion of FTN's Buffalo network raises the possibility of substantial penalties under our customer contracts and places into doubt the release of additional funding for the continued construction and operation of FTN networks.

Verizon's behavior in Buffalo that has produced this extraordinary delay of almost eight months stands in sharp contrast to the company's performance with respect to underground facilities in Syracuse and Albany during the period when the New York Public Service Commission was assisting the parties to resolve a similar dispute regarding access to poles. At that time, in those markets, FTN was permitted to participate in field inspections (in accordance with Agreement § IV(4)(a)), resulting in immediate and certain knowledge as to where conduit was available and where it was not. Verizon in Buffalo, however, denied us that right.

Instead, Verizon's officials in Buffalo insisted that we undergo an expensive and seemingly endless process. First, we were required to pay for a search of Verizon's written conduit records, the results of which were held by Verizon for prolonged periods. Once the results were revealed, FTN was presented with two possibilities. If the search showed no conduit, we were faced with the need to apply for a different route. If the record search showed available conduit, we were required to pay Verizon contractors to inspect the requested facilities to confirm availability. We were not permitted to be present at these field inspection (in violation of Agreement § IV(4)(a)), and the contractors were instructed to submit directly to Verizon the results of their inspections and to withhold the results from FTN. Verizon then held the information submitted by the contractor for a prolonged period and ultimately produced stick drawings that purportedly revealed whether the requested conduit was available. If the conduit was reported as unavailable, we were to start the process over, paying for new record searches and new field inspections from which we would be barred.

Severely compounding the delays and expenses entailed in this dilatory routine is the fact that many reports from Verizon personnel or Verizon-controlled contractors have been factually incorrect. In the most recent round of reports from Verizon contractors regarding conduit availability – *based on actual physical inspection of the requested conduit* – Verizon misstated in 14 cases the availability of conduit: either reporting that conduit was available where it was not or reporting that conduit was not available when it actually was. The route segments affected by these false reports are throughout the proposed underground network, making it impossible for FTN to get underway with construction in any portion of the underground network. It is beyond the reach of our imagination to conceive of how full conduit can be mistaken for empty conduit upon physical inspection or how empty conduit can be viewed and determined to be full. Nevertheless, these false reports ensured that our progress remained stymied.

Verizon insisted that we follow the above-described process of <u>seriatim</u> applications, secret searches, secret inspections, stick drawings, re-applications, incorrect reports, and further re-applications, in violation of Agreement § IV(4), despite numerous requests that FTN be permitted to pursue the more efficient and reasonable course, reflected by the Agreement, that was permitted in Syracuse and Albany during the period of PSC involvement. The result of this insistence has been severely detrimental to FTN.

Rather than having the conduit necessary to allow facilities-based competition in Buffalo fully licensed by the end of the year 2000, as should have occurred, FTN still is entangled in the apparently endless dance choreographed by Verizon's Buffalo representatives. This kind of delay, combined with the accumulating payments to Verizon for fees associated with applications, searches, inspections, and stick drawing and the expense of starting and stopping our own crews in this market, not only is delaying the advent of competition in the Buffalo area but also is draining this company's resources.

2. Verizon's Imposition of Additional Delay and Cost by Banning White Knight

Verizon added to the delay and expense experienced by FTN in Buffalo by refusing to allow FTN's construction affiliate, Fiber Technologies Construction Company (also know as "White Knight"), to perform work on behalf of FTN. When FTN sought to begin work in Buffalo, Verizon stated that White Knight had been removed from the list of Verizon-approved contractors in the Buffalo region. (White Knight has continued at all times to work successfully, without challenge, as an authorized Verizon contractor in the Syracuse and Albany regions.) Verizon banned White Knight from working on FTN's Buffalo network despite the fact that Verizon had never before notified White Knight that it was being removed from the list of authorized contractors and had not sent any manner of formal notice of problems with White Knight's work. FTN harbors serious doubts as to whether the ban of White Knight from work involving Verizon's Buffalo facilities (imposed within one or two months of FTN's submission of conduit applications for Buffalo, according to your e-mail of July 20 to Mr. Chiaino) was imposed for legitimate reasons. The belief that removal of White Knight from the Verizon contractor list was merely a step toward further obstruction of FTN's plans to bring widespread competition to the Buffalo telecommunications marketplace is buttressed as Verizon engages in renewed attacks on FTN and its affiliates, including the unsupported and baseless allegation in your e-mail to Mr. Chiaino that White Knight inflicted "intentional damage to conduits *[sic]* systems". FTN and White Knight hereby categorically and emphatically deny that White Knight intentionally committed any damage.

3. Verizon's Failure to Live Up to the Remedial Agreement of May 8, 2001.

On May 8, 2001, Verizon and FTN reached an agreement ("Memorandum of Understanding" or "MOU") regarding steps to be taken to allow the completion of the underground portions of FTN's Buffalo network. A key component of the agreement was the provision that "Verizon will provide two dedicated crews to tone and paint cables for removal as described in number 2, above". Paragraph "number 2" speaks of FTN's commitment to use Verizon-approved contractors to remove cut-off, unused Verizon cable from approximately 41,100 feet of conduit after Verizon crews had "toned" and "painted" such cables (to guarantee the correct facilities would be removed). The MOU went on to provide that Verizon would "provide three inspectors for five weeks to support up to five FT crews of Verizon-approved contractors to perform cable removal, innerduct placement, and fiber cable installation" (para. 5). The Verizon crews and inspectors were to begin work on May 9.

The intention of the parties was that the two dedicated Verizon crews would complete the limited task of painting the retired cables with sufficient speed to permit the completion of the cable removal (together with FTN's installation of Verizon innerduct and FTN fiber) within five weeks, i.e., by mid-June. Nevertheless, Verizon today still has not finished painting the cables. Moreover, it is our understanding that Verizon's Buffalo representatives now may take the position that, because more than five weeks have elapsed from the signing of the MOU, Verizon is relieved from any obligation to provide the inspectors that were promised in MOU paragraph 5 and that are essential, under rules imposed by Verizon, if FTN is to install any innerduct and fiber. FTN will not accept such bad faith dealing. We reject as ridiculous and false any assertion that might be uttered to the effect that Verizon lived up to its commitment to dedicate two crews to painting dead cable. That the crews were not dedicated to this task is established not only by the fact that, after so much time, the task remains unfinished but also by the fact that FTN repeatedly asked Verizon for information concerning the whereabouts of the crews but could reach no Verizon official who would acknowledge authority over, and direct knowledge of, the crews' activities.

Verizon has prevented FTN from installing innerduct and fiber as contemplated by the MOU not only by failing to dedicate crews as described above but by failing to direct such crews (at the times they were actually engaged in painting cable for removal) to follow the route established by the list of priorities submitted by FTN to Verizon. As you are aware, fiber cannot be installed haphazardly. Long, unbroken runs of free conduit and innerduct are required before fiber can be deployed. FTN identified the order of segments to be cleared in order to permit FTN to begin deploying fiber while the identification and removal of old cables and the installation of innerduct was still proceeding. Such compression of tasks into a single timeframe is essential if the Buffalo network is to be built with any reasonable degree of speed and expense. Nevertheless, for no apparent legitimate reason, the Verizon crews have followed their own preferences when picking the order of route segments to address. The result is that today – over six weeks after all underground work should have been completed under the terms of the MOU – FTN still cannot proceed with fiber installation.

4. The Anticompetitive Use of Its Conduit Facilities in Buffalo Argues for Splitting Verizon-New York.

Under its current corporate structure, Verizon-New York Inc. is permitted to pursue wholesale and retail functions through a single entity. Under this arrangement, Verizon suffers no expense or delay, such as FTN has experienced, when it elects to deploy new facilities for its own business purposes. The threat to the development and survival of competition that is posed, inherently, when one company controls bottleneck right-of-way facilities and seeks to sell services over those facilities is accentuated dramatically when that company uses its control of facilities to impose indefensible barriers to entry. Verizon's use of control over its conduit system, as described above, to prevent FTN from building an open-access fiber network for the delivery of services that will compete with Verizon's retail services presents, in microcosm, the most compelling argument for splitting Verizon-New York Inc. into separate wholesale and retail entities.

B. PROPOSED REMEDY

In light of the history set forth above, including the added costs and the risks of contractual penalties and loss of funding that wrongfully have been imposed on FTN, FTN has proposed that it be allowed to install fiber in innerduct that Verizon terms "maintenance" duct where such duct is open in segments in which no other duct is available. Where such duct is used, FTN will carry out its commitment to remove old Verizon cable to create newly available conduit, which conduit then can serve as "maintenance" duct. In essence, then, FTN is proposing the underground equivalent of use of temporary pole attachments pending completion of all appropriate make-ready work. FTN soon will submit to Verizon a detailed proposal designed to permit Verizon to limit and even avoid FTN's use of "maintencance" duct by properly scheduling and accelerating the performance of make-ready work on other conduit.

As you know, the idea that FTN will be permitted to complete its Buffalo network by use of Verizon "maintenance" duct has received support from Verizon officials outside the Buffalo-specific region. Considerations justifying such support include not only the history of severely anti-competitive behavior outlined above but also the fact that Verizon does not preserve "maintenance" duct throughout its system. It is clear that, when Verizon needs to install its own wires in "maintenance" duct, to satisfy its own non-emergency business needs, it will do so. To deny FTN that same right – especially under the circumstances that exist today – would compound the injury already wrongly inflicted on FTN by Verizon's Buffalo representatives.

Regarding power-rodding to clear unoccupied conduit, this is a technique permitted by Verizon in the Syracuse and Albany areas. You apparently refer to an incident somewhere in Verizon's experience in the Buffalo area where power-rodding resulted in damage to facilities to justify your refusal to permit FTN to use such a technique to clear unoccupied conduit. Given the wide acceptance of power rodding as a legitimate and useful approach to fully employing existing conduit facilities and permitting efficient and speedy deployment of additional fiber lines, including acceptance by Verizon itself, and given both the history of Verizon's obstructionist activities in the Buffalo area and also the serious consequences suffered by FTN as the result of this behavior, it would be unreasonable for Verizon's Buffalo representatives to continue prohibiting FTN's Verizon-approved contractors from using this technique.

C. CONCLUSION

I urge you and your directors to reconsider the apparent decision to continue to refuse cooperation with FTN. As noted above, "maintenance" ducts and power-rodding are used in Buffalo or elsewhere by Verizon. Even if Verizon were to reach a legitimate business decision that no one, including Verizon, should employ these techniques under normal circumstances, they should be allowed to FTN in the current situation as a means of remediating the prolonged course of anticompetitive conduct noted in this letter.

As I noted in the preceding section of this letter, FTN will soon propose a detailed plan to remediate the harm inflicted by Verizon and permit the completion of FTN's Buffalo network. I urge that you and Verizon's directors in the Buffalo market favorably consider this proposal. If our companies fail to quickly reach an agreement that fully resolves the current situation, FTN will seek relief elsewhere.

Very truly yours,

Charles B. Stockdale

Charles B. Stockdale
Vice President and Corporate Counsel

cc: Frank Chiaino
Marybeth Thompson
Don Henry
Wajeeha Aziz
James Slavin

fibertech networks®

phone 585-697-5100
fax 585-442-8845
140 Allens Creek Road
Rochester, NY 14618

August 6, 2004

Manager-License Administration Group
Verizon-New England
185 Franklin Street
Boston, MA 02110

By Airborne Express

Dear Sir or Madam:

Please consider this letter to be a complaint submitted pursuant to paragraph 11 of the Settlement Agreement entered into by Verizon, Fibertech Networks, LLC ("Fibertech"), Massachusetts Electric Company, and Western Massachusetts Electric Company on or about May 20, 2004.

Fibertech hereby complains that the estimated costs for conduit record searches and manhole surveys in response to applications numbered C-2004-0081 and C-2004-0083 (Licensee reference numbers SPR 9023-1C and SPR 9024-1C, respectively) are unreasonable and excessive. (Hereinafter Application number C-2004-0081 will be referred to as "Application 81" or "App. 81" and Application number C-2004-0083 will be referred to as "Application 83" or "App. 83".)

Fibertech believes that the estimated costs are based on both an excessive number of labor hours and excessive labor rates. Fibertech questions and challenges the increases in cost, whether attributable to the number of labor hours or the labor rates, that we have experienced over the last several years. The estimate for Application 81, filed July 20, 2004, reflects an average cost of $4.46 per linear foot. The estimate for Application 83, filed July 23, 2004, reflects an average cost of $6.09 per linear foot. Verizon has attributed the increase in cost from App. 81 to App. 83 to "increased loaded labor rates". Approximately two years ago we were being charged somewhat more than $2.00 per linear foot of requested innerduct for record searches and physical surveys. We believe even that much lower rate is unreasonable and excessive.

We also question and challenge the need for an engineer and two field techs to participate in the field survey. We believe that a crew of two persons is adequate to conduct a conduit field survey.

Fibertech requests that it be allowed to be present at and participate in any conduit record search and any conduit field survey. By granting this request Verizon would enable Fibertech to confirm or effectively challenge the asserted number of labor hours upon which Verizon's billing for these functions is based. It would also help prevent situations in which Fibertech is informed that conduit space is available only to find later that it is not available, as well as situations where Fibertech is informed that conduit space is unavailable only to find later that it is available.

Fibertech requests that, subsequent to completion of the record search and field survey for a particular application, Verizon provide Fibertech with an itemized bill identifying the personnel who worked on the application, the nature of their work, the dates on which they performed the work, and the time spent on each task on each day. For example, we would like to know which engineer examined the records, when he did it, and how long it took him, as well as which engineer prepared the manhole drawings, when he did so, and how much time was required for the task. We would also like to see reported the dates that each relevant manhole was inspected, who was involved in each inspection, and the time required to perform the inspection (including travel, manhole preparation, actual surveying, and closing the hole). We believe that this sort of billing detail, which is standard in most service businesses, would play an important role in preventing future disputes or at least allowing the parties to resolve disputes more efficiently.

Finally, Fibertech requests that Verizon provide Fibertech with all invoices received by Verizon for police protection attributable to a physical survey performed in response to a Fibertech application. If Verizon is marking up its police protection costs in determining the charges it imposes on Fibertech, Fibertech reserves the right to assess and challenge the appropriateness of any such mark-up. Fibertech's current sense is that any such mark-up must at most be minimal.

I am attaching to this letter copies of Fibertech's applications 81 and 83, together with Verizon's cost estimates. Those documents relating to Application 81 are labeled Exhibit A, and those relating to Application 83 are labeled Exhibit B. Also attached are two relevant e-mail trains, which are labeled as exhibits C and D.

Thank you for your attention to this matter.

Very truly yours,

Charles B. Stockdale

Charles B. Stockdale
Vice President and Corporate Counsel

Cc: Gary Muisus
Alexander Moore, Esq.

EXHIBIT 6
VERIZON INVOICE

verizon

Billing Date:	09/16/2005
Damage Date:	/ /
Bill Number:	215G190380905
Claim Number:	
Bill Type:	TV
Authorization Number:	04A19038
Questions? Call:	800-486-4138

Description

CLEC CONDUIT MAKE READY WORK - PENN AVENUE, PITTSBURGH, PA. APPLICATION #12128 - FIBER TECHNOLOGIES NETWORKS

Charge Description	Hours	Amount
ENGINEERING	9.50	1,776.83
CONTRACTOR'S SERVICES		14,418.52
MATERIAL		129.41
ADDITIONAL CHARGE		1,441.85
CREDIT FOR ADVANCE PAYMENT		-5,546.00

Total Amount Due By 10/16/2005 **$12,220.61**

A late payment charge may apply.

THANK YOU FOR USING VERIZON

Please write the bill number on your check. Mail bottom stub with your payment to address below.
In the event your check for payment of your Verizon Communications Bill is returned by your bank for insufficient or uncollected funds, Verizon may resubmit your check electronically to your bank for payment from your checking account.

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verizon

Special Projects Billing

Claim Number
Bill Number 215G190380905
Total Amount Due **$12,220.61**
Please pay By 10/16/2005

☐☐,☐☐☐.☐☐

FIBER TECHNOLGIES NETWORKS LLC
ATTN: SHAWN BLANNER
SUITE 201
607 PENN AV
PITTSBURGH PA 15222

Verizon
P.O. Box 60
Cockeysville, MD 21030-0060

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